

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 137.

THE NEW YORK, PHILADELPHIA & NORFOLK RAILROAD
COMPANY, PLAINTIFF IN ERROR,

v/s.

THE PENINSULA PRODUCE EXCHANGE OF MARYLAND.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF
MARYLAND.

FILED APRIL 27, 1914.

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a MARYLAND, *sct:*

At the Court of Appeals of the said State begun and held at Annapolis in and for said State on the first Monday of October, being the sixth day of the said month, in the year of our Lord one thousand nine hundred and thirteen and in the one hundred and thirty eighth year of the Independence of the United States of America.

Were Present: Boyd, Chief Judge; Briscoe, Burke, Thomas, Pattison, Urner, Stockbridge, Constable. Associate Judges.

Among other were the following proceedings, to wit:

THE NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY,
a Corporation,
vs.

THE PENINSULA PRODUCE EXCHANGE OF MARYLAND, a Corporation.

1 *Copy Transcript of Record.*

In the Circuit Court for Somerset County, State of Maryland.

THE PENINSULA PRODUCE EXCHANGE OF MARYLAND, a Corporation,
vs.

THE NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY, a
Corporation.

Appeal from the Circuit Court for Somerset County.

The Peninsula Produce Exchange of Maryland, a corporation, incorporated under the laws of Maryland, by Melvin & Handy, Ellegood, Freeny & Wailes and H. Fillmore Lankford, its attorneys, sues the New York, Philadelphia and Norfolk Railroad Company, a Corporation incorporated under the laws of the State of Maryland, and holding and exercising franchises therein as well as in other States of the United States, for that the said defendant is engaged as a common carrier for hire in the transportation of goods, wares and merchandise and farm products and other property between points in the State of Maryland and points in the State of Pennsylvania and other States of the United States, and as such common carrier is subject to the provisions of the Act of Congress of the United States to regulate commerce approved February 4th, 1887, and Acts amendatory thereof or supplementary thereto. And that the plaintiff did, on or about the 26th day of May, 1910, deliver to the said defendant at its Railroad Station at Marion, in Somerset County, Maryland, one car of strawberries, containing two hundred and forty thirty-two quart crates, that is to say seventy-six hundred and eighty-one quarts of strawberries, and five five-eighths baskets of peas, which

2 said strawberries and peas were consigned to H. Warne & Son, New York City, in the State of New York, which said strawberries were received at the station aforesaid by the said New York, Philadelphia & Norfolk Railroad Company for transportation for hire, to the said City of New York over and by way of its lines or railroad and over other connecting railroad lines operating as common carriers for hire to be paid by the plaintiff, and the plaintiff says that the said strawberries and peas were to be transported with safety, and with reasonable dispatch, and delivered to the said H. Warne & Son in safe condition and with reasonable diligence, but the said defendant, or its connecting lines, or the terminal line, to wit, the Pennsylvania Railroad Company, a Corporation incorporated under the laws of the State of Pennsylvania, and a common carrier for hire as aforesaid, did not, with safety and with due diligence, dispatch or forward the said strawberries, or transport or deliver the same with reasonable dispatch and in a safe condition as they were in duty bound to do, but detained the same, by reason of which detention and delay in transportation and delivery, the said strawberries and peas were damaged, and failed to reach their point of destination in the City of New York, until too late for the market of the day for which they were shipped and received as aforesaid and for which they would have arrived in due time, if the said defendant and the connecting and terminal lines or railroads had used due and reasonable diligence in the transportation and in the delivery thereof to the said H. Warne & Son, and because of the said delay and detention of the said strawberries, they were greatly damaged, and a large shrinkage in the value of the said strawberries took place, both because of the deterioration of their condition and because of the decline in the market value or price of the said strawberries and the plaintiff was greatly damaged and suffered loss because said strawberries were not delivered with reasonable dispatch by the said common carriers on the day of the market for which they were transported.

3 And the plaintiff claims therefor the sum of four hundred dollars damages.

HANDY & MELVIN,
ELLEGOOD, FREENY & WAILES,
H. FILLMORE LANKFORD,
Attorneys for Plaintiff.

Demurrer.

(Signed) R. B. Cooke.

In the Circuit Court for Somerset County.

No. 39, Trials, April Term, 1911.

PENINSULA PRODUCE EXCHANGE OF MARYLAND
vs.

THE NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY.

The defendant, the New York, Philadelphia & Norfolk Railroad Company, a corporation existing under the laws of the State of

Maryland, by Miles & Stanford, its attorneys, as to the plaintiff's declaration or narr., says: That the same is insufficient in law.

MILES & STANFORD,
Attorneys for Defendant.

Which said demurrer was on the 10th day of July, 1911, overruled by the Court.

4

Plea.

(Filed 27 July, 1911.)

In the Circuit Court for Somerset County.

No. 39, Trials, July Term, 1911.

PENINSULA PRODUCE EXCHANGE OF MARYLAND
vs.

NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY.

The defendant, by Miles & Stanford, its attorneys, for pleas to the plaintiff's declaration, says:

First. That it never promised, as alleged.

Second. That it never was indebted, as alleged.

Third. That it did not commit the wrongs, alleged.

MILES & STANFORD,
Attorneys for Defendant.

Replication.

(Filed 4 Sept., 1911.)

In the Circuit Court for Somerset County, Maryland.

THE PENINSULA PRODUCE EXCHANGE OF MARYLAND, a Corporation,

vs.

THE NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY, a Corporation.

The plaintiff says, through its attorneys, for replication to the first, second and third pleas of the defendant, that it joins issue thereon.

MELVIN & HANDY,
ELLEGOOD, FREENY & WAILES,
Attorneys for the Plaintiff.

Defendant's Bills of Exceptions.

(Filed 30th July, 1913.)

In the Circuit Court for Somerset County.

No. 5, Trials, April Term, 1913.

THE PENINSULA PRODUCE EXCHANGE OF MARYLAND
vs.

THE NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY.

The plaintiff at the trial of this case, to sustain the issues on its part, produced as a witness Winter C. Cullen, who testified, as follows:

That he is the Secretary, Treasurer and General Manager of plaintiff corporation, that on May 26th, 1910, he instructed his agent, Mr. F. T. Adams, at Marion Station, to ship a car of strawberries to H. Warne & Sons, New York, to ship and bill the car out on the afternoon of Thursday, May 26th, in order to catch the first berry train from Marion Station to Jersey City; that on the same evening he received notice from Mr. Adams that the car had been sent according to his instructions, and that he gave due notice to H. Warne & Sons, by wire, that later he received a telegram from H. Warne & Sons, and also the account of sales on said car of strawberries; that on June 29th, 1910, he made claim in writing, to R. B. Cooke, Traffic Manager of the N. Y., P. & N. R. R. Co. for the actual loss on the car in question, and received reply from Mr. Cooke, acknowledging receipt of the claim. Mr. Cooke handles all claims of that road to whom we have always sent all claims for damages; that he also received from Mr. Cooke the two following letters in reference to Plaintiff's claim. .

New York, Philadelphia & Norfolk Railroad.

Traffic Department.

R. B. Cooke, Traffic Manager.

NORFOLK, VA., Aug. 25, 1910.

N. Y., P. & N. R. R. Claim No. 68028.

Claim No. —.

Peninsula Produce Exchange of Md., Pocomoke City, Md.

GENTLEMEN: We beg to return papers in your claim for \$153.60, alleged loss account of damage to 240 crates of strawberries in Car F. E. G. No. 21416 from Marion, Md., to H. Warne & Sons, New York, May 26, 1910, as our investigation develops the fact that this shipment reached New York and was ready for delivery at 4.30

a. m. the morning of May 27th, and inasmuch as we do not guarantee any particular hour of the day to make delivery, regret exceedingly that claim for the alleged delay shipment met with, cannot be entertained.

Yours truly,
(Signed)

R. B. COOKE.
T. M.
"W."

W. M.

New York, Philadelphia & Norfolk Railroad Co.

Traffic Department.

R. B. Cooke, Traffic Manager.

NORFOLK, VA., February 16, 1911.

N. Y., P. & N. R. R. Claim No. 68028.

Claim No. —.

Peninsula Produce Exchange of Maryland, Pocomoke City, Md.

7 GENTLEMEN: Returning papers in your claim No. 833 received with your favor of the 15th instant, beg to say that our letter of September 22nd, 1910, outlines our position, and regret exceedingly that we will not be in a position to entertain claim.

Yours truly,
(Signed)

R. B. COOKE.
"W."

Traffic Manager.

W. M.

Witness further testified, that he had been a shipper over the New York, Philadelphia & Norfolk R. R. to the New York market for more than fifteen years; that from his knowledge of the route of travel of the car in question from Marion to New York, the car would be taken from Marion Station to Delmar by the N. Y. P. & N. R. R. and there turned over to the Delaware Railroad which is a leased part of the Pennsylvania, and transported by it to Jersey City. The witness was then asked—state what, if any knowledge, you may have have as to the time of the delivery by this Railroad, the N. Y., P. & N. R. R., and its connection from Marion Station to Jersey City, for the New York Market, and when the car was due to arrive at Jersey City for the New York Market, to which question the defendant objected, but the Court admitted the question, subject to objection, and the witness answered as follows:

That the car was due to leave Marion Station that evening, on one of their pick-up trains, and was to be taken to Delmar and there given over to the Delaware Railroad, who hauls it on what is known

as their D2 train, which is a train transporting perishable goods, running up the Delaware Railroad; that the train was due to arrive at Jersey City sometime on the evening of the 27th, having left Delmar at 8 o'clock on the morning of the 27th; that it was due 8 to arrive at Jersey City between nine and eleven o'clock; that he got this information by being shown by the trainmaster of the N. Y. P. & N. R. R. the routing—the time book, and from having shipped that way to New York for the last fifteen years, and on that train for the last eight years; that he was employed by the defendant Company in the year 1900, and prior to that time had assisted his father at Hopewell as agent for the said Railroad Company; that during that time he had acquired knowledge as to the running of similar trains, and that the only change made in the running of trains in the last ten or fifteen years is that they run then one to two hours earlier from the starting point; that from his experience as a shipper, train leaving Marion Station around six or seven o'clock in the afternoon would reach Jersey City before the following evening.

At the conclusion of the testimony, the defendant moved the Court to strike out the said question, and witness' testimony in answer thereto, but the Court overruled said motion, to which said ruling the defendant excepted and prays the Court to sign and seal this its First Bill of Exceptions, which is accordingly done this 12th day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's Second Bill of Exceptions.

After the proceedings set forth in defendant's First Bill of Exceptions, which is hereby made a part of this, the plaintiff to further sustain the issues on its part produced as a witness, FRED T. ADAMS, who testified as follows:

That he was the agent for the plaintiff corporation at Marion Station and had been agent for three or four years; that he received 9 the following bill of lading for the carload of berries in question.

New York, Philadelphia & Norfolk Railroad Co.

Shipping Receipt for Perishable Property (Straight Consignment).

Original—Not Negotiable.

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Shipping Receipt.

MARION, 5-26-1910.

From Penn. Pro. Ex. of Md. the property described below, in apparent good order, except as noted (contents and condition of packages unknown) marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of de-

livery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed, hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

Consigned to H. Warne & Son.

Destination, New York, State of --, County of --, Route --,
Car Initial --.

F. G. E. Car No. 21416.

240 32-quart crates S. Berries.

5/8 Bas. Peas.

Penn. Pro. Ex. of Md., Shipper.

Per F. T. Adams.

10 This Shipping Receipt is to be signed by the shipper and agent of the carrier issuing same.

Conditions.

SEC. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided. No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weight of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession and the burden to prove freedom from such negligence shall be on the carrier or party in possession, the carrier or party in possession shall not be liable for loss, damage or delay occurring while the property is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall

11 be on the party or carrier in possession.

SEC. 2. In issuing this bill of lading this company agrees to transport only over its own line, and accept as otherwise provided by law, acts only as agent with respect to the portion of the route

beyond its own line. No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route; nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in the bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

SEC. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail. The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bonafide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based in any of which events such lower value shall be the maximum amount to govern such compensation whether or not such loss or damage occurs from negligence. Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within 12 four months after the delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable. Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon, or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

SEC. 4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all the charges hereunder.

SEC. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there

held at owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges,
13 including a reasonable charge for storage. The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays) for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage. Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

SEC. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless under a special agreement to do so and a stipulated value of the articles are indorsed hereon.

SEC. 7. Every party whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

SEC. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required,
14 shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in the bill of lading, the freight charges must be paid upon the articles actually shipped.

SEC. 9. Except in case of diversion from rail or water route, which is provided for in Section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lake, sea or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property. The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

SEC. 10. Any alteration, addition or erasure in this bill of lading which shall be made without endorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

The plaintiff then offered said bill of lading in evidence.

15 The witness was then asked: Have you any knowledge of the ordinary and usual running time of these berry trains leaving Marion Station, or their arrival, and of delivery of the berries in New York? To which question the defendant objected, but the Court admitted the question, subject to objection, and the witness answered as follows:

That he worked in the New York markets for several years; that since he had been with the Peninsula Produce Exchange he had shipped probably fifty cars a year from Marion Station; that he thought there had been no change for the last ten or twelve years in the leaving time of these trains; that the ordinary and usual leaving time from Marion Station for these berry trains was about seven or eight o'clock A. M. that they would arrive in New York around one o'clock, sometimes a little earlier, but around one o'clock in the night. At the conclusion of the testimony the defendant moved the Court to strike out the said question and the testimony of the witness in answer thereto, which had been admitted, subject to objection, but the Court overruled said motion, to which ruling the defendant excepted, and prays the Court to sign and seal this its second bill of exceptions, which is accordingly done this 12th day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's Third Bill of Exceptions.

After the proceedings set forth in the foregoing bills of exception, which are hereby made a part of this, the said witness, Fred T. Adams, further testified that this particular car was delivered to the Railroad Company at Marion Station, on May 26th, but he did not know at what hour, that he believed the cars loaded in the afternoon at Marion Station went out on the six o'clock passenger train in the evening, which is not a regular berry train.

16 The witness was then asked. When do they arrive at the New York market according to the usual or customary routing or running on the trains? To which question, the defendant objected, but the Court admitted the same subject to objection, and the witness answered as follows: The only knowledge I have of it at the other end, is that if you get the carload of berries on what they call the first section, it might be in there at 12:30; the second section may be behind that and the third section behind that, etc., and my understanding is that if the car is sent out on the evening train it catches the first section. To which answer the defendant objected, but the Court admitted the same, subject to ob-

jections. At the conclusion of the testimony the defendant moved the Court to strike out the said question and answer, so as aforesaid admitted, subject to objection, but the Court overruled said motion to which ruling the defendant excepted, and prays the Court to sign and seal this its third bill of exception, which is accordingly done, this 12th day of January, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's Fourth Bill of Exceptions.

After the proceedings set forth in the aforesaid Bills of Exception, which are hereby made a part of this, the said witness, Fred T. Adams, was asked. What is the opening time of the market in New York, for these berries? To which question the defendant objected, but the Court admitted the same subject to objection, and the witness answered. The Jersey City berries are carted to the houses and there is a special time, customary time, that the houses are open, that is about midnight. Some of them stay open all night, but the customary time for the market to open

is at midnight. To which answer the defendant objected,

17 but the Court admitted the same — *subjection.* At the conclusion of the testimony, the defendant moved the Court to strike out the said question and answer so as aforesaid admitted, subject to objection, but the Court overruled said motion to which ruling the defendant accepted, and prays the Court to sign and seal this its Fourth Bill of Exceptions, which is accordingly done this 12th day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's Fifth Bill of Exceptions.

After the proceedings set forth in the aforesaid Bills of exceptions which are hereby made a part of this, the said witness, Fred T. Adams, was asked. From your knowledge what is the effect on the market value of berries arriving there around one o'clock, and arriving there around four or five o'clock? to which question the defendant objected, but the Court admitted the same subject to objection, and the witness replied: As a rule the better trade or grocery trade, as well as the jobbing men, must get back to their store by daylight, and of necessity they must buy their stuff by three o'clock or before and get back to their stores, or get their stuff shipped out the near towns as the case may be, and the market is usually better between 1 and 3 o'clock than it is after that. To which answer, the defendant objected, but the Court admitted the same, subject to objection. At the conclusion of the testimony, the defendant moved the Court to strike out the said question and answer so as aforesaid admitted, subject to objection, but the Court overruled said motion, to which ruling the defendant

18 excepted, and prays the Court to sign and seal this its fifth bill of exceptions, which is accordingly done this 12th day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's Sixth Bill of Exceptions.

After the proceedings set forth in the foregoing Bills of Exception, which are hereby made a part of this, the said witness, Fred T. Adams, was asked. What is the effect on the market value of the berries that arrive between one and three, and those that arrive after three? To which question the defendant objected, but the Court admitted the same subject to objection, and the witness replied. The better trade is gone and the market almost invariably declines. I have known instances where it might possibly have been the other way. Of course, there is trading all day long, but the better grade of it is over between three — o'clock, after that we are dependent upon what is commonly known as the cheap trade, that is peddlers, and cheap grocery stores. To which answer the defendant objected, but the Court admitted the same, subject to objection.

At the conclusion of the testimony, the defendant moved the Court to strike out the said question and answer, so as aforesaid admitted, subject to objection, but the Court overruled said motion, to which ruling the defendant excepted, and prays the Court to sign and seal this its Sixth Bill of Exception, which is accordingly done this 12th day of June, 1913.

ROBLEY D. JONES, Judge. [SEAL.]

Defendant's Seventh Bill of Exception.

19 After the proceedings set forth in the foregoing Bills of Exceptions which are hereby made a part of this, the plaintiff, to further sustain the issues on its part, produced in evidence the deposition of Hezekiah Warne, Jr., taken under the provision of Section 17 of Article 35 of the Code of Public General Laws of Maryland, which said witness; testified as follows:

That he was forty-one years old, and residing in Westfield, N. J., and that his occupation was that of salesman, that he had a business acquaintance with the plaintiff corporation. After being shown the bill of lading offered in evidence witness stated that he received shipment on or about the 27th or 28th of May, 1910, from the Peninsula Produce Exchange, that he sold part of the shipment on Saturday and the balance he put in freezer until Monday morning, as it was then too late for disposing of the berries at the time they were delivered. Witness was then asked at what time does the berry and pea market close daily? to which question defendant objected, but the Court admitted the same subject to objection and witness replied. Daily the best of the market is past between six and seven o'clock. The best market is between one and two o'clock, in the morning, after six there is nothing doing. To which answer the defendant objected but the Court admitted the same subject to objection. At the conclusion of the testimony the defendant moved the Court to Strike out said ques-

tion and answer, but the Court overruled said motion, to which ruling the defendant excepted and prays the Court to sign and seal this its Seventh Bill of Exception which is accordingly done this 12th day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's Eighth Bill of Exception.

After the proceedings set forth in the defendant's foregoing bill of exception which are hereby made a part of this, the said witness continued his testimony as follows: That the load of goods in question was received in the yard by his drayman, J. B. Wemple, who delivered them to him. Witness was then asked: I understand from your answer, that you sold part of your shipment on Saturday and carried the other part over until Monday, why did you not sell all on Saturday? To which the witness replied: there was no demand, and they were delivered so late that the trade was over. To which answer the defendant objected but the Court admitted the same subject to objection. At the conclusion of the testimony the defendant moved the Court to strike out the said question and answer but the Court overruled said motion, to which ruling the defendant objected and prays the Court to sign and seal this its Eighth Bill of Exceptions, which is accordingly done, this 12th day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's Ninth Bill of Exception.

After the proceedings set forth in the defendant's foregoing bills of exceptions, which are hereby made a part of this, the said witness was then asked—At what time during the night does the market commence? To which question the defendant objected but the Court admitted the same subject to objection and the witness replied—Our market commences from twelve to one o'clock, to which answer the defendant objected, but the Court admitted the same subject to objection. At the conclusion of the testimony, the defendant moved the Court to strike out the said question and answer but the Court overruled said motion, to which ruling the defendant excepted and prays the Court to sign and seal this 21 its Ninth Bill of Exceptions, which is accordingly done this 12th day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's Tenth Bill of Exception.

After the proceedings set forth in the defendant's foregoing bills of exceptions, which are hereby made a part of this, the said witness was asked—What was the condition of the market for berries and

peas during the first part of the night of Friday the 27th? To which question the defendant objected, but the Court admitted the same, subject to objection and the witness replied—Well, I cannot recall that it was stronger than is sure in the early morning. To which answer the defendant objected, but the Court admitted the same, subject to objection. At the conclusion of the testimony the defendant moved the Court to strike out the aforesaid question and answer, so as aforesaid admitted, subject to objection, which motion the Court overruled, to which ruling the defendant excepted and prays the Court to sign and seal this its tenth bill of exceptions, which is accordingly done this 12th day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's 11th Bill of Exceptions.

After the proceedings set forth in the defendant's aforesaid bills of exception, which are hereby made a part of this, the said witness, further testified that he rendered the defendant the following account of sales for the car of berries and peas in question, and that said account of sales was correct.

NEW YORK, June 1st, 1910.

22

Hezekiah Warne & Sons,
Produce Commission Merchants, 124 Warren St., near Wash-
ington St.

Sold for M. Penn. Produce Ex.

| | | | | |
|--------------------------|-------------|-------|--------|-----------------|
| 5-28 | 73-32 | S. B. | 8 | \$186.88 |
| | 45-32 | S. B. | 7 | 100.80 |
| | 56-32 | S. B. | 6 | 107.52 |
| | 2-32 | S. B. | 6 | 3.60 |
| | 64-32 | S. B. | 5 | 102.40 |
| <hr/> | | | | |
| | 240 Crt. | | 16 | 38.40 |
| | 5 bas. Peas | (5-8) | 50 | 2.50 |
| <hr/> | | | | |
| | | | | 542.10 |
| on 240 crt., Frt. & Ctg. | | | 143.40 | |
| 5-25..1 crt., " | | | .44 | |
| Est. on 5 bas. Peas | | | .90 | 144.74 \$397.36 |
| <hr/> | | | | |
| | Com. | | | 40.30 |
| <hr/> | | | | |
| | | | | \$357.06 |

The plaintiff then offered the account of sales in evidence to the jury to which offer the defendant objected, but the Court admitted the same, subject to objections, and at the conclusion of the testimony the defendant moved the Court to strike out said account of

sales, as evidence in this case, which motion the Court overruled, to which ruling the defendant excepted, and prays the Court
23 to sign and seal this its Eleventh Bill of Exceptions, which is accordingly done this 12th day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's Twelfth Bill of Exceptions.

After the proceedings set forth in the defendant's foregoing Bills of Exceptions, which are hereby made a part of this, the said witness was then asked: If this shipment had been received before four o'clock in the morning of the day on which it was received, would you have been able to have sold it? To which question the defendant objected but the Court admitted the same subject to objection, and the witness answered as follows: Yes, for more money than it was sold for afterwards. To which answer the defendant objected, but the Court admitted the same, subject to objection, and at the conclusion of the testimony, the defendant moved the Court to strike out said question and answer, but the Court overruled said motion, to which ruling the defendant excepted and prays the Court to sign and seal this its 12th Bill of Exceptions, which is accordingly done this 12th day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's Thirteenth Bill of Exceptions.

After the proceedings set forth in the defendant's foregoing Bills of Exceptions, which are hereby made a part of this, the said witness further testified that he received the said shipment of peas and strawberries, after their arrival in New York, and that there was no fault in the condition of same, that they were in good condition, but late delivery. That he was in the habit of receiving shipments
24 from Somerset County, Maryland, by way of the N. Y. P. & N. R. R. The witness was then asked: Have you any knowledge with regard to the length of time required to transport freight of the character of the car in question, from Somerset County to New York? To which question the defendant objected, but the Court admitted the same subject to objection, and the witness answered: A shipment sent in the morning, on the following day about twelve o'clock. To which answer the defendant objected but the Court admitted the same, subject to objection, and at the conclusion of the testimony, the defendant moved the Court to strike out the said question and witness' answer thereto, but the Court overruled the motion, to which ruling the defendant excepted, and prays the Court to sign and seal this its 13th Bill of Exceptions, which is accordingly done this 12th day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's 14th Bill of Exceptions.

After the proceedings set forth in the defendant's aforesaid bills of exceptions, which are hereby made a part of this, the plaintiff, to further sustain the issues on its part offered in evidence depositions of John B. Wemple, taken under the provisions of Section 17, Article 35, of the Code of Public General Laws of Maryland, which said witness testified that he was sixth-eight years old and resided at 67 Perry Street, New York; that his occupation was that of a truckman; that on or about the 26th, 27th and 28th of May, 1910, he served as truckman for H. Warne & Sons, and that on the 27th and 28th of May, 1910, he delivered to them a carload containing 240 crates of berries and five baskets of peas, that he was present at Jersey City when the car arrived, but he did not remember just the time it arrived—did not remember whether it arrived at or before twelve o'clock, at night. Witness was then asked at what time during the night or day you received the shipment from the railroad? To which question the defendant objected but the Court admitted the same, subject to objection, and the witness answered, as near as I can remember about that car, it was long after daylight. I did not receive it early, I am sure of that. To which answer the defendant objected, but the Court admitted the same, subject to objection, and at the conclusion of the testimony the defendant moved the Court to strike out the said question and answer, which motion the Court overruled, to which ruling the defendant excepted, and prays the Court to sign and seal this its 14th bill of Exceptions, which is accordingly done this 12th day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's Fifteenth Bill of Exceptions.

After the proceedings set forth in the defendant's aforesaid bills of exceptions, which are hereby made a part of this, the said witness further testified as follows: That as soon as he could get the car open he sent the berries to the store of H. Warne & Sons: that he had been hauling truck, such as berries, peas etc., for forty-eight years. The witness was then asked Are you able to state, from your knowledge, what is the effect upon the price of berries after arriving after twelve o'clock or later than two o'clock, to which question the defendant objected, but the Court admitted the same, subject to objection. And the witness answered—Yes. The witness was then asked—What effect does it have? To which question the defendant objected, but the Court admitted the same, subject to objection, and the witness answered—After that the market is not as good. To which answer the defendant objected, but the Court admitted the same, subject to objection. At the conclusion of the testimony the defendant moved the Court to strike out said question and answer, so as aforesaid admitted, subject to objection, which motion the Court overruled, to which ruling the

defendant excepted and prays the Court to sign and seal this its 15th Bill of Exception, which is accordingly done this 12th day of May, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's Sixteenth Bill of Exceptions.

After the proceedings set forth in the defendant's foregoing Bills of Exceptions, which are hereby made a part of this, plaintiff to further sustain the issues on its part, produced in evidence the depositions of M. Russell Warne, taken under Section 17 of Article 35 of the Code of Public General Laws of Maryland, which said witness testified as follows: That he was thirty-three years old and resided in New Brunswick, N. J. that his business was that of salesman and Commission Merchant and member of the firm of H. Warne & Sons, that he was acquainted with the plaintiff corporation in a business way, as shipper: that on or about the 27 and 29th day of May, 1910, his firm received daily shipments from the plaintiff, and upon being shown the bill of lading, offered in evidence, witness testified that he received the lot of peas, five $\frac{5}{8}$ baskets and 240 crates of strawberries from plaintiff. Witness was then asked, do you remember at what time or times shipment arrived at Jersey

City? To which question the defendant objected, but the 27 Court admitted the same, subject to objection, and witness answered: I say, about 6 o'clock. To which answer the defendant objected, but the Court admitted the same, subject to objection, and at the conclusion of the testimony the defendant moved the Court to strike out the said question and answer, but the Court overruled the said motion, to which ruling the defendant excepted and prays the Court to sign and seal this its 16th bill of exception, which is accordingly done this 12th day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's Seventeenth Bill of Exception.

After the proceedings set forth in the defendant's foregoing bills of exceptions, which are hereby made a part of this, the same witness was asked—are you familiar with the opening and progress of the market during the right for berries and peas in New York? To which question the defendant objected, but the Court admitted the same subject to objection, and the witness answered—I am, yes. The witness was then asked—if any goods are received after twelve o'clock at night, does it make any difference in their market price after two o'clock? (state fully) to which question the defendant objected, but the Court admitted the same, subject to objection, and the witness answered—Our best market is from 11 to 3 o'clock, that is the best market for the best trade, the highest price trade. To which answer the defendant objected, but the Court admitted the same subject to objection. At the conclusion of the testimony the defendant moved the Court to strike out the said question and an-

swers but the Court overruled the said motion, to which ruling the defendant excepted and prays the Court to sign and seal this 28 its 17th bill of Exceptions, which is accordingly done this 12th day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's Eighteenth Bill of Exception.

After the proceedings set forth in the defendant's foregoing bills of exceptions, which are hereby made a part of this, the same witness was asked: What happens after that, if they do not get there earlier than five o'clock in the morning: To which question the defendant objected, but the Court admitted the same, subject to objection, and the witness answered—Well the later the arrival the smaller the price. To which answer the defendant objected, but the Court admitted the same, subject to objection. At the conclusion of the testimony the defendant moved the Court to strike out the foregoing question and answer so as aforesaid admitted, Subject to objected, but the Court overruled the motion, to which ruling the defendant excepted and prays the Court to sign and seal this its 18th bill of exceptions, which is accordingly done this 12th day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's Nineteenth Bill of Exceptions.

After the proceedings set forth in the defendant's foregoing Bills of Exceptions, which are hereby made a part of this, the said witness further testified that he did not sell the shipment, but that the firm, his brother,—sold it and that the firm rendered an account of sale. Upon being shown the account of sales, offered in evidence as set forth in the defendant's 11th Bill of Exceptions, the witness stated,

29 that it was an exact copy of the sale of 240 crates of berries and 5 baskets of peas: that it was a correct account of sale and the exact account of sales rendered the Produce Exchange of Maryland: that it was the correct account of sales of the shipment in question. The witness was then asked. Are you familiar with the time ordinarily consumed in transporting produce from Somerset County, Maryland, to Jersey City? To which question the defendant objected, but the Court admitted the same, subject to objection, and the witness answered fourteen to eighteen hours. To which answer the defendant objected, but the Court admitted the same, subject to objection. At the conclusion of the testimony, the defendant moved the Court to strike out the said question and answer so as aforesaid admitted, subject to objection, but the Court overruled the motion, to which ruling the defendant excepted, and prays the Court to sign and seal this its 19th Bill of Exceptions, which is accordingly done this 12 day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's Twentieth Bill of Exception.

After the proceedings set forth in the defendant's foregoing bills of exceptions, which are hereby made a part of this, witness was asked—How long have you been acquainted with this fact? I want your length of experience. To which question the defendant objected, but the Court admitted the same subject to objection, and witness replied Ten years or longer. To which answer the 30 defendant objected, but the Court admitted the same subject to objection. At the conclusion of the testimony, the defendant moved the Court to strike out the said question and answer, so as aforesaid admitted, subject to objection, but the Court overruled the motion, to which ruling the defendant excepted and prays the Court to sign and seal this its 20th Bill of exception, which is accordingly done this 12 day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Defendant's Twenty-first Bill of Exceptions.

After the proceedings set forth in the Defendant's foregoing bills of exceptions, which are hereby made a part of this, the same witness was asked: If this shipment of peas and strawberries, inquired about had arrived at 4 o'clock at Jersey, would or would not they have brought more money than they did to which question the defendant objected, but the Court admitted the same subject to objection, and the witness replied—Well they would have brought two or three cents a quart more. To which answer the defendant objected, but the Court admitted the same, subject to objection. At the conclusion of the testimony the defendant moved the Court to strike out the said question and answer but the Court overruled the motion, to which ruling the defendant excepted, and prays the Court to sign and seal this its 21st Bill of Exception, which is accordingly done this 12 day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

31 Defendant's Twenty-second Bill of Exceptions.

After the proceedings set forth in the defendant's foregoing Bills of Exceptions, which are hereby made a part of this, the same witness was asked: Why did you not sell all of them on the day they arrived? To which question the defendant objected, but the Court admitted the same, subject to objection, and the witness answered—because when they were received all the buyers and the trade in general had gone home, and there was no one to sell them to, unless we sold them to a lot of cheap peddlers from the East side. To which answer the defendant objected, but the Court admitted the same subject to objection. At the conclusion of the testimony, the defendant moved the Court to strike out the said question and answer, but the Court overruled the motion, to which ruling the defendant excepted and prays

the Court, to sign and seal this its 22nd Bill of Exceptions, which is accordingly done this 12th day of June, 1913.

RÖBLEY D. JONES, Judge. [SEAL.]

Defendant's Twenty-third Bill of Exceptions.

After the proceedings set forth in defendant's foregoing bills of exceptions, which are hereby made a part of this, the defendant to sustain the issues on its part, offered in evidence pages 1, 20 and 21 of official classification No. 35 having the following title page,
32 and bearing the following certificate of the Secretary of the Interstate Commerce Commission, under the seal of said Commission, also special tariff of the N. Y. P. & N. R. R. Co., I. C. C. No. 2414, bearing said certificate of the Secretary of the Interstate Commerce Commission.

Official Classification No. 35.

(Cancels Official Classification No. 34 and Supplement Thereto.)

Applies on Freight Traffic covered by tariffs issued subject thereto. Whenever a carload (or less-than-carload) commodity rate is established, it removes the application of the class rates to or from the same points on that commodity in carload quantities (or less-than-carload quantities, as the case may be), except when in so far as alternative use of class and commodity rates is specifically provided for by including in different sections of one and the same tariff such class and commodity rates, and by including in each section of such tariff the specific rule "If the rates in section—of this tariff make a lower charge on any shipment than the rates in section—will be applied." (See Rule 7 (a) Tariff Circular No. 17-A, Interstate Commerce Commission.)

Application hereof is subject to individual and joint exception schedules established by parties hereto.

(See Rule 13, Circular No. 38, State of New York Public Service Commission, Second District.)

Issued November 15, 1909. Effective January 1, 1910.

33 Issued and filed with the Interstate Commerce Commission, Board of Railway Commissioners for Canada; Public Service Commission, State of New York, first and Second Districts, Railroad Commission of Indiana; Michigan Railroad Commission and Railroad Commission of Ohio, by F. S. Helbrook, agent, for the individual carriers shown herein, and for all Carriers coming under the supervisors of the Railroad Commission of Ohio.

The Official Classification Committee.

O. F. Lovenberg, Secretary.
F. S. Holbrook, Chairman.

Office, 143 Liberty Street, New York.

Property shipped under common carrier's liability and not subject to all the terms and conditions of the Uniform Bill of Lading will be carried under the terms set forth in Rule 1 of this classification.

Rules and Special Instructions.

Unless otherwise provided when property is transported subject to the provisions of the Official Classification, the acceptance and use are required respectively, of the "Uniform Bill of Lading" "Straight" or "Order" (pages 13 & 20). "Export Bill of Lading" (page 22) "Uniform Live Stock Contract" (page 25) "Contract with man or men in charge of Live Stock (for use when payment of fare 34 is not required) (page 27) "Contract with man or men in charge of property other than livestock" (for use when payment of fare is not required) (page 28), and contract with man or men in charge of property other than Live Stock" (for use when payment of fare is required) (page 28).

A Star (*) denotes Additions.

A Dagger (†) denotes Changes.

1. (A) In order that the consignor may have the option of shipping property, either subject to the terms and conditions of the Uniform Bill of lading hereinafter set forth or under the liability imposed upon common carriers by the common law and the federal and state statutes applicable thereto, this Official Classification provides for different rates and for different forms of bills of Lading to be used, respectively, as the consignor may elect to have a limited liability or a common carrier's liability service.

(B) Unless otherwise provided in this Classification, property will be carried at the reduced rate specified if shipped subject to all the terms and conditions of the Uniform Bill of Lading (See pages 18 and 20). If consignor elects not to accept all the terms and conditions of the Uniform Bill of Lading, he should so notify the agent of the forwarding carrier at the time his property is offered for shipment. If he does not give such notice, it will be understood that he desires his property carried subject to the terms and conditions of the Uniform Bill of Lading in order to secure the reduced rate.

35 (C) Property carried not subject to all the terms and conditions of the Uniform Bill of Lading will be at the carrier's liability, limited only as provided by Common law and by the laws of the United States and of the several States in so far as they apply, but subject to the terms and conditions of the Uniform Bill of Lading in so far as they are not inconsistent with such common carrier's lia-

bility, and the rate charged therefor will be ten per cent (10%) higher (subject to a minimum increase of one (1) cent per one hundred pounds) than the rate charged for property shipped subject to all the terms and conditions of the uniform Bill of Lading (See Note).

(D) When the consignor gives notice to the agent of the forwarding carrier that he elects not to accept all the terms and conditions of the Uniform Bill of lading, but desires a carrier's liability service at the higher rate charged for that service, the carrier must print, write or stamp upon the Bill of Lading a clause reading "In consideration of the higher rate charged, the property herein described will be carried at the carrier's liability, limited only as provided by law, but subject to the terms and conditions of the Uniform Bill of Lading in so far as they are not inconsistent with such common carrier's liability."

36 (E) The cost of insurance against marine risk will not be assumed by carriers unless specifically provided for in tariffs.

NOTE.—In computing the rate to be charged upon property shipped not subject to the terms and conditions of the Uniform Bill of Lading, ten (10) per cent, of the reduced rate shall be added thereto (subject to a minimum increase of one (1) cent per one hundred pounds). If the result includes a fraction of one cent, it shall be expressed decimaly in tenths of one cent; for example, if the reduced rate is twenty-one (21) cents per one hundred pounds the rate to be charged when shipped not subject to the terms and condition of the Uniform Bill of Lading will be twenty-three and one tenth (23.1) cents per one hundred pounds; if the reduced rate be sixteen and one-half (16½) cents per one hundred pounds, the higher rate will be eighteen and one tenth (18.1) cents per one hundred pounds, if the reduced rate is ten (10) cents per hundred pounds, the higher rate will be eleven (11) cents per one hundred pounds; if the reduced rate is four (4) cents per one hundred pounds, the increase will be the minimum increase of one cent per one hundred pounds, and the higher rate to be charged will be five (5) cents per one hundred pounds.

(Here follows bill of lading marked pages 37 and 38.)

Property shipped under common carrier's liability and not subject to all the terms set forth in Rule 1 of this classification.

Uniform Bill of Lading Standard form of Straight Bill of Lading approved by
(TO BE PRINTED)

Straight Bill of Lading—Original - Not Negotiable.

RECEIVED subject to the classification and tariffs in
at.....
from..... THE PROPERTY
tents and condition of contents of packages unknown) marked, consigned and
of delivery at said destination--if on its road, otherwise to deliver to another
all or any of said property over all or any portion of said route to destination,
service to be performed hereunder shall be subject to all the conditions whether
which are agreed to by the shipper and accepted for himself and his assigns
The Rate of Freight from.....
to..... is in cents per 100

| If—times 1st | If 1st Class | If 2nd Class | If Rule 25 | If 3rd Class | If Rule 25 |
|--------------|--------------|--------------|------------|--------------|------------|
|--------------|--------------|--------------|------------|--------------|------------|

(MAIL ADDRESS—NOT
FOR
RECOR

Consigned to.....

Destination..... State of..... Con

Route..... Car Initial..... Con

| No. of Packages | Description of Articles and Special Rates | Weight Subject to Correction | Class |
|--------------------|---|---------------------------------|-------|
| | | | |

..... Shipper.....

Per..... Per.....

(This Bill of Lading is to be signed by the Shipper and agent of the

- Not Negotiable.

Shippers No.

Agents No.

D subject to the classification and tariffs in effect on the date of issue of this Original Bill of Lading.

19...

THE PROPERTY DESCRIBED BELOW IN APPARENT GOOD ORDER EXCEPT as noted (concerning the packages unknown) marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of destination on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of concern or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every carrier shall be subject to all the conditions whether printed or written, herein contained (including conditions on back hereof) and shall accept for himself and his assigns

T.
is in cents per 100 lbs.

| If 1st Class | If Rule 25 | If 3rd Class | If Rule 26 | If Rule 28 | If 4th Class | If 5th Class | If 6th Class | If Special per | If Special per |
|--------------|------------|--------------|------------|------------|--------------|--------------|--------------|----------------|----------------|
|--------------|------------|--------------|------------|------------|--------------|--------------|--------------|----------------|----------------|

(MAIL ADDRESS—NOT FOR PURPOSE OF DELIVERY)

State of County of

Car Initial Car No.

If charges are to be prepaid write or stamp here "To be Prepaid".

| and Special Rates | Weight Subject to Correction | Class or Rate | Check Col'm. | |
|-------------------|---------------------------------|---------------|--------------|-------|
| | | | | |

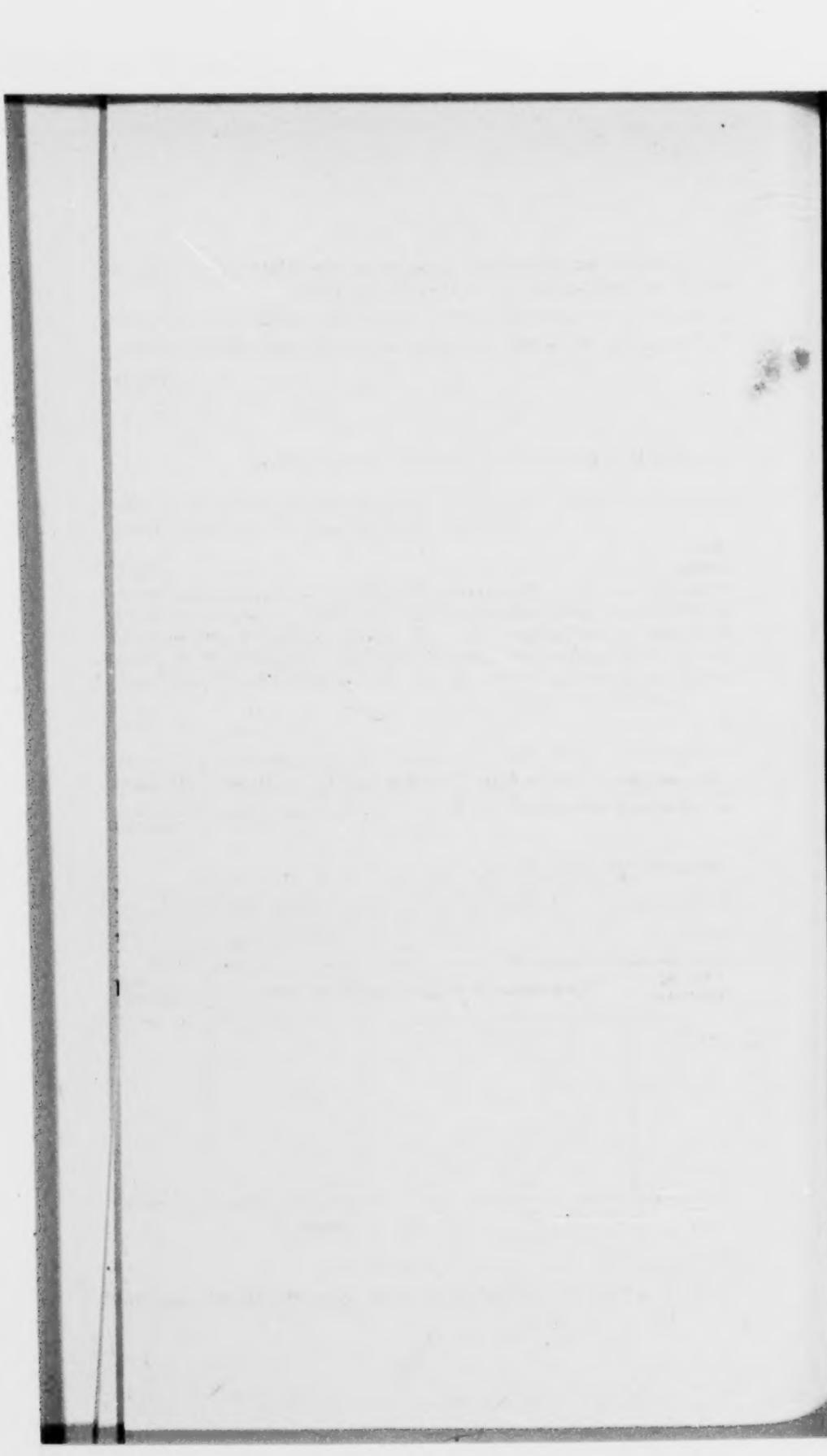
Shipper Agent.

Per
(To be signed by the Shipper and agent of the carrier issuing same)

Received \$..... to apply in pre-payment of the charges on the property described hereon.

.....
Agent or Cashier.
Per(The signature here only acknowledges the amount prepaid.)
.....

Charges Advanced:



SECTION 1. The carrier or party in possession of any of the property herein described shall be liable for any loss or danger thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for difference in the weight of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For less damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of arrival of the property at designation or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession) the carrier or party in possession shall not be liable for less, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

40 SEC. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect, to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from such liability so imposed.

SECTION 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right, in case of physical necessity to forward said property by any railroad or route between the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight

charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

41 Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or, in case of failure to make delivery then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

SEC. 4. All property shall be subject to necessary cooperage and baling at owners' cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

SEC. 5. Property not removed by the party entitled to receive the same within forty-eight hours (exclusive of legal holidays) 42 after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman, only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage. The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car had been held forty-eight hours (exclusive of legal holidays) for loading or unloading, and may add such charge to all other charges hereunder, and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage. Property destined to or taken from a station or wharf, or landing, at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels and when received from or delivered on private or other sidings,

wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

SEC. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

SEC. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, be liable for all loss or damage caused thereby and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

43 SEC. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

SEC. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions, provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes and this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or any other waters, or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any of all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "Water Carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument. If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the provisions of the tariff, which shall be treated as incorporated into the conditions of this Bill of Lading.

SEC. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading, shall be enforceable according to its original tenor.

[The third paragraph of Section 9 did not appear in the last issue of the Classification.]

No Supplement to this Tariff will be issued except for the purpose of Cancelling the Tariff.

I. C. C. No. 2414. Cancels I. C. C. No. 2174.

New York, Philadelphia & Norfolk Railroad Co.

Pennsylvania Railroad Company [Fx-No. 459].

Joint Freight Tariff on Berries [Any Quantity].

Estimated Weights.

| | | | |
|-------------------|----------------|----------------------|---------------|
| 24-quart crates.. | 40 pounds each | 48-quart crates..... | 80 lbs. each |
| 32-quart crates.. | 50 pounds each | 60-quart crates..... | 100 lbs. each |
| 36-quart crates.. | 60 pounds each | 90-quart crates..... | 150 lbs. each |

Crates Differing From Above, Actual Weight From

45 Stations on the New York, Philadelphia & Norfolk Railroad.

[Cape Charles, Va., and North thereof, including Crisfield Branch
[Per I. C. C. No. 2363 or subsequent issues thereof in effect at time of
shipment]

to

Chester, Pa., Jersey City, N. J., Philadelphia, Pa., Newark, N. J.,
Wallabout Station, Brooklyn, N. Y., Wilmington, Del.

Subject to Rules and Regulation of Official Classification I. C. C.
No. 35 [F. S. Holbrook, agent] except as otherwise provided herein;
or as shown in Exceptions to the Official Classification, P. R. R.
G. O., I. C. C. No. 850 and supplements thereto or subsequent issues
thereof in effect at time of shipment.

Facilities, Privileges and Deliveries.

The rates named herein apply from and to the tracks, stations or
other receiving and delivering points on, or to and from private
sidings connected with lines parties to this tariff, where the particular
tariff is usually received or other receiving and delivering
points, or private siding, subject, nevertheless, to such charges [if
any] for switching, terminal service, storage, icing and all other
charges and any rules and regulations that may in any wise change,
affect or determine any part, or the aggregate of such rates as
well as any privileges or facilities granted or allowed, as are, or shall
be, published by any of the lines parties to this tariff and filed

46 with the Inter-State Commerce Commission; and any other
changes for strictly local service or regulations incidental
thereto lawfully on file with the Interstate Commerce Commission.
The rates will also apply to and from such tracks, stations or other
receiving and delivering points on, or to and from private sidings
connected with connecting lines not parties to this tariff, when and
as designated and provided for in delivery tariffs published by any
of the lines parties to this tariff, and lawfully on file with the Inter-
state Commerce Commission.

Demurrage and Car Service Regulations.

Under this Tariff, when freight is to be located by consignor or unloaded by consignee, \$1.00 per car per day or fraction thereof, for delay beyond forty-eight hours in loading or unloading will be added to the rates named herein and constitute a part of the total charges to be collected by the carrier on the property; except that Car Demurrage Bureau or local regulations at shipping point or destination lawfully on file with the Inter-State Commerce Commission, shall prevail and govern at such points.

Issued Norfolk, Va., March 31st, 1910.

In Effect May 2nd, 1910.

200 copies.

File 353.

R. B. Cooke, Traffic Manager.

Agent's Index No. 100.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the documents hereto attached, and more particularly hereinafter described, are true copies of 47 schedules filed with the said Interstate Commerce Commission on dates specified below, to wit:

New York, Philadelphia & Norfolk Railroad Company Joint Freight Tariff I. C. C.

No. 2414, Filed on March 31, 1910.

Official Classification No. 35, F. S. Holbrook, Agent, I. C. C.—O. C. No. 35, filed on November 16, 1909.

Supplement No. 1 to said I. C. C.—O. C. No. 35, Filed November 18, 1909.

Supplement No. 2 to said I. C. C.—O. C. No. 35, filed December 1, 1909.

Supplement No. 3 to said I. C. C.—O. C. No. 35, filed December 15, 1909.

Supplement No. 4 to said I. C. C.—O. C. No. 35, filed February 16, 1910.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 16th day of April, A. D. 1913.

[SEAL.]

GEORGE B. McGINTY,

Secretary of the Interstate Commerce Commission.

To which offer the plaintiff objected, and the Court sustained the objection, to which ruling the defendant excepted, and prays the Court to sign and seal this its 23rd Bill of Exception, which is accordingly done this 12th day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

48 *Defendant's Twenty-fourth Bill of Exception.*

After the proceedings set forth in the aforesaid Bills of Exceptions, which are hereby made a part of this, the plaintiff submitted the two following prayers:

Plaintiff's First Prayer (Granted).

The plaintiff prays the Court to instruct the jury that if they shall believe from the evidence that the Peninsula Produce Exchange delivered to the New York, Philadelphia and Norfolk Railroad Company, at Marion Station, in Somerset County, Maryland, one of its stations in said county, on the 26th day of May, 1910, a carload of strawberries in good condition, said car containing two hundred and forty crates of strawberries of thirty-two quarts each, consigned to H. Warne & Son, at New York City, in the State of New York, and that said railroad company received said berries and issued the bill of lading therefor offered in evidence, to be transported over its line and connecting railroad lines, to be delivered to said H. Warne & Sons, then it became the duty of said defendant and all connecting lines to use reasonable care, diligence and exertion in forwarding and transporting and delivering said berries to the said H. Warne & Sons, and if the jury shall believe that said defendant and the connecting railroad lines, or any of them, did not use such care, diligence and exertion in forwarding, transporting and delivering the said berries, and shall further find that by reason of the failure of said New York, Philadelphia and Norfolk Railroad Company and the connecting railroad lines, or any of them, to use such care, diligence and exertion, the said berries arrived at their destination in New York City too late for the market of the day for

49 which they were received and transported by the defendant and the connecting railroad lines, that is to say, too late for the market of the day on which they would have arrived if they had been forwarded and transported with such care, diligence and exertion, and that the plaintiff thereby sustained loss, then their verdict should be for the plaintiff, and they may embrace in their verdict any loss which they find to have been sustained by the plaintiff from the decline in the market value between the time when said berries could have been sold if they had been transported with due dispatch, and the time when they were actually sold.

Plaintiff's Second Prayer (Granted).

If the jury shall find damages for the plaintiff, then they may allow, in their discretion, interest upon such damages.

And the defendant submitted the seven prayers following:

Defendant's First Prayer (Rejected).

The defendant prays the Court to instruct the jury that, under the pleadings and evidence in this case there is no legally sufficient evidence to entitle the plaintiff to recover, and that their verdict must be for the defendant.

Defendant's Second Prayer (Rejected).

The defendant prays the Court to instruct the jury that, under the pleadings and evidence in this case, there is no legally sufficient evidence of any delay occurring on the line of the defendant, and that their verdict must be for the defendant.

Defendant's Third Prayer (Rejected).

50 If the jury believe from the evidence, that, at the time the shipment of berries mentioned in the declaration in this case was delivered to the defendant, the defendant issued therefor to the plaintiff the bill of lading offered in evidence in this case, and shall further find that the said defendant did not transport and deliver the said berries with reasonable dispatch and shall further find that between the time when said berries should have arrived at their destination, had they been transported with reasonable dispatch, and the time at which they actually did arrive, there was a fall in the market price of said berries, and that by reason of the fall in the market price, the plaintiff suffered loss, then the plaintiffs are entitled to recover nominal damages, only, provided the jury further find that the said shipment of berries was delivered by the defendant or its connecting line to the consignee at destination in sound and marketable condition, and that the said berries suffered no loss, damage or injury before delivery to consignee.

Defendant's Fourth Prayer (Rejected).

The defendant prays the Court to instruct the jury that there is no evidence of any real or actual damage suffered by the plaintiff for which the defendant is liable, under the contract of shipment produced in evidence in this case, and that, even though the jury may find that the berries mentioned in the declaration were not transported and delivered with reasonable dispatch the plaintiff can recover only such trifling and insubstantial damages as the law calls nominal damages.

5. (Rejected.) The defendant prays the Court to instruct the jury that the provisions of the amendment to the Interstate Commerce Act, customarily known as the Carmack Amendment, do not impose on the carrier receiving a shipment in one state for transportation to another state liability for delay which occurred not on its line but on the line of a succeeding carrier into whose possession the goods may be delivered for movement to or in the direction of destination.

6. (Rejected.) The defendant prays the Court to instruct the jury that the uncontradicted evidence in the case shows that the tariffs of the defendant, duly published and on file with the Interstate Com-

merce Commission, published two rates available in connection with shipments of strawberries, the one available if the shipment was transported under the terms of the bill of lading which terms are set forth in the tariffs; the other a rate of 10 per cent higher, which was available if the shipment was transported under the common law liability of the carrier, that the shipment which is the subject matter of this section was transported under the former and lower rate and subject to the terms and conditions of the bill of lading as published in the tariff, and a bill of lading containing these terms and conditions was duly issued by the carrier, as required by law, upon receipt of the shipment. In determining what damages, if any, the complainant is entitled to recover in this action, the jury must be guided entirely by the terms and conditions of the bill of lading, since the reasonableness of its terms and conditions may not be questioned in this Court.

7. (Rejected.) The defendant prays the Court to instruct the jury that the defendant corporation was not bound, under its contract with the plaintiff, as shown by the bill of lading offered in evidence, to deliver the berries of the plaintiff by any particular train or in 52 time for any particular market, or otherwise than with reasonable dispatch, and if the jury shall find, from the evidence, that the train carrying the berries, referred to in the testimony, arrived at the point of destination with reasonable dispatch, and during the market hours, on the day following the start of said train from Delmar, Delaware, as was usual with such trains, if the jury find that this was usual, then their verdict must be for the defendant, although the jury may find that the berries of the plaintiff would have sold at a higher price if they had been received at an earlier hour of the same market day.

And when plaintiff's said prayers were offered the defendant objected, in writing to their being granted, both generally and specially, because there was no legally sufficient evidence to sustain them; and when defendant's said prayers were offered the plaintiff objected generally to the granting of all of defendant's said prayers, and filed the following special objection to the granting of defendant's 5th and 7th prayers.

No. 5, Trials.

PENINSULA PRODUCE EXCHANGE

vs.

N. Y., P. & N. R. R.

The plaintiff objects specially to the defendant's fifth and seventh prayers.

- 1st. Because they assume facts not proved in the case.
- 2nd. Because they submit questions of law to the jury.
- 3rd. Because there is no legally sufficient evidence to support the prayers.
- 53 4th. Because the same are confusing and misleading.

JAMES E. ELLEGOOD,

HANDY & MELVIN,

H. FILLMORE LANKFORD,

Attorneys for Plaintiff.

But the Court granted both the plaintiff's said prayers, and rejected all of the defendant's seven prayers, to which ruling of the Court the defendant excepted, and prays the Court to sign and seal this its 24th Bill of Exceptions which is accordingly done, this 12th day of June, 1913.

ROBLEY D. JONES, *Judge.* [SEAL.]

Docket Entries.

In the Circuit Court for Somerset County.

No. 5, Trials, April Term, 1913.

THE PENINSULA PRODUCE EXCHANGE OF MARYLAND, a Corporation,
vs.

THE NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY,
a Corporation.

Sums, &c.

1911, Feb'y 23. Titling filed.

" Apr. 27. Narr filed.

" June 2. Demurrer filed.

" July 10. Demurrer overruled.

" July 27. Defendant's plea filed.

54

" Sept. 4. Replication filed.

" Oct. 9. Motion & leave for commission.

Judge Stanford's disqualification entered.

1912, Sept. 23. Depositions of Hezekiah Warne, Jr., John D. Wem-
ple and M. Russell Warne on behalf of plaintiff
filed.

" " " Exhibits filed. Trial and Jury by plaintiff.

1913, April 24. Jury ordered empanelled and sworn.

" " " Defendant's exceptions filed.

" " " Plaintiff called.

" " " Jury finds for plaintiff and assesses the damages at
\$180.48 and motion and judgment nisi on verdict
for \$180.48 with interest from date and costs.

" " " Defendant allowed until July 1st to file exceptions.

" June 12. Defendant's bills of exceptions filed and sent to
Judge Jones.

" " 17. Order for appeal filed.

" July 29. Papers returned and exceptions filed.

Order for Appeal.

In the Circuit Court for Somerset County, State of Maryland.

No. 5, Trials, April Term, 1913.

THE PENINSULA PRODUCE EXCHANGE OF MARYLAND, a Corporation,
vs.
THE NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY,
a Corporation.

Mr. CLERK: Please enter an appeal from the judgement in
55 this case to the Court of Appeals.

MILES & MYERS,
Attorneys for Defendant.

which said appeal being by our said Court granted, it is thereupon ordered that a transcript of the record in the case aforesaid be transmitted to the Court of Appeals of Maryland, and the name is transmitted accordingly.

Test:

S. FRANK DASHIELL, *Clerk.*

In testimony that the aforesaid is truly taken from the records and proceedings of the Circuit Court for Somerset County, in the case therein entitled, I hereunto subscribe my name and affix the seal of the Circuit Court for Somerset County, this 13th day of August, 1913.

S. FRANK DASHIELL, *Clerk.*

Cost in Somerset County.

| Appellant's costs. | | Appellee's costs. | |
|--------------------|---------|-------------------|---------|
| Attorney | 5.00 | Attorney | 5.00 |
| Clerk Record | 17.40 | Clerk | 11.95 |
| Sheriff | 1.35 | Sheriff | 1.35 |
| Crier | .70 | Crier | .70 |
| | <hr/> | | <hr/> |
| | \$22.40 | | \$19.00 |

Filed August 16", 1913.

No. 44, Oct. T., 1913.

Sides.

Opinion of the Court.

Court of Appeals of Maryland, October Term, 1913.

THE NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY
vs.
PENINSULA PRODUCE EXCHANGE OF MARYLAND.

Boyd, C. J., Burke, Urner, Stockbridge, and Constable, JJ.

To be reported.

Judge URNER delivered the opinion of the Court.

The appellee delivered to the appellant railroad company a car-load of strawberries for transportation from Marion, Maryland, to New York city over the lines of the defendant and connecting carriers. It is alleged in the declaration that the defendant, or companies operating the connecting lines, failed to forward the shipment with reasonable dispatch; that because of this delay the berries did not reach their destination until after the close of the market for which they were intended and for which they would have arrived in time if due diligence had been observed in their transportation; and that they consequently sustained a large shrinkage and loss in value. The evidence shows that the strawberries were shipped from Marion on the afternoon of Thursday, May 26, 1910, and according to the usual operation of trains engaged in this class of service they should have been delivered in New York City the following night in advance of the early Saturday morning wholesale market, which opened about one o'clock a. m. The shipment reached its destination in good condition, but about six hours later than the customary time of arrival. The wholesale market, for which the berries were shipped and in which they could have been sold to advantage, was then practically at an end and the price had fallen two or three cents per quart below that which might have been received if they had been forwarded with the usual dispatch. The berries had to be sold at these lower prices because of the delay in their delivery.

57 The defendant was sued as the initial carrier under the Carmack amendment of 1906 to the Interstate Commerce Act of 1887, which provides in part: "That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transporta-

tion company to which such property may be delivered, or over whose line or lines such property may pass; and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company, from the liability hereby imposed." (34 Stat. at L. 584, Ch. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288).

The first question raised by the exceptions in the record is whether the loss of value resulting from delay in transit for which the plaintiff seeks to recover is within the purview of the provisions quoted making the initial carrier liable "for any loss, damage or injury to such property." It is argued on behalf of the defendant that according to the true interpretation of the statute the only cases for which it provides are those in which the commodities themselves become damaged or depleted in the course of the transportation, and that an impairment of value due to delay in delivery, while it occasions a loss to the owner, does not produce such loss, damage or injury to the property as the act contemplates. The theory thus advanced does not appear to give due regard to the purpose of this important legislation and the considerations which prompted its passage.

In Adams Express Company vs. Croninger, 226 U. S. 151, it was said, in the opinion by Mr. Justice Lurton, that prior to the Carmack amendment "the rule of carriers' liability for an interstate shipment of property, as enforced in both Federal and State Courts, was either that of the general common law, as declared by this court and enforced in the Federal Courts throughout the United States (Hart vs. Pennsylvania R. Co. 112 U. S. 331), or that determined

58 by the supposed public policy of a particular state (Pennsylvania R. Co. vs. Hughes, 191 U. S. 477), or that prescribed by statute law of a particular state (Chicago, M. & St. P. R. Co. vs. Solan, 169 U. S. 133). Neither uniformity of obligation nor of liability was possible until congress should deal with the subject

* * * That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation or contract * * * The duty to issue a bill of lading, and the liability thereby assumed, are covered in full; and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject."

It was said in Atlantic C. L. R. Co. vs. Riverside Mills, 219 U. S. 203, in reference to the effect of this statute: "The rule is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility. The regulation is one which also facilitates the remedy of one who sustains a loss, by localizing the responsible carrier."

In B. C. & A. R. R. Co. vs. Sperber, 117 Md. 602, Chief Judge Boyd, in referring to some of the reasons for the enactment of this statute, said: "When goods were shipped at a great distance over connecting lines, the rule which required a shipper sustaining loss

to prove on which line it occurred oftentimes resulted in great hardship, and sometimes in a failure to recover, simply because the shipper could not produce evidence to show where the loss occurred. It may in some instances be burdensome to the initial carrier to be held responsible for loss, damage or injury to the property caused by some other carrier, to whom it is delivered, or over whose line it passes, but it cannot be denied that the initial carrier can generally protect itself far better than a shipper can, and it might easily have happened under the former rule that a shipper would be prevented from collecting a just claim by reason of the great expense occurred, and inconvenience sustained, in an effort to establish it in a distant Court.⁵⁹

The reason and policy of the act as thus indicated in the decisions cited are sufficiently broad to include the liability here sought to be charged. The remedies of shippers in respect to losses of value from delay of transportation were subject to the same diversities and inconveniences as were those relating to recovery for physical injury to the property accepted for carriage. In each class of cases there was an apparent and equal need of uniformity and simplicity in the regulation and enforcement of the carrier's liability. The duty to deliver without undue delay was just as obligatory at common law as the duty to deliver safely. *Baltimore & Ohio R. R. Co. vs. Whitehill*, 194 Md. 310. In *P. B. & W. R. Co. vs. Diffendal*, 109 Md., 509, this Court, speaking through Judge Worthington, said that it became the implied duty of a defendant in accepting a carload of fruit for transportation "to use due diligence to deliver the same at its destination within a reasonable time (*Hutchinson on Carriers*, Sec. 652), and for a breach of this duty resulting in a loss to the plaintiff, the defendant was responsible in damages, whether the loss was occasioned by a fall in the market price, or by damage to the goods themselves, or by a combination of the two causes." If the appellant's construction of the statute were accepted it would only partially accomplish the purpose for which it was enacted. While undertaking to deal in a comprehensive way with the general subject of carrier liability under any bill of lading issued by it for an interstate shipment, the law would be confined in its practical operation to a portion only of the cases in which the property may be injuriously affected by the carrier's failure to perform its common law duty. It is not to be supposed that Congress intended the terms of the statute to have such a restricted application. The initial carrier is made liable "for any loss, damage or injury to such property caused by it" or by any connecting carrier. The primary object of the act was to provide a convenient remedy for any loss to the commodity occasioned by any carrier in the course of the transportation,⁶⁰ and not to define particular classes of damages to which recovery should be limited. It is with the right of the person sustaining the loss and not with any specific causes of injury to the property that the statute is concerned. If the goods received for shipment in fact suffer loss, damage or injury in course of transit, through any failure of carrier duty, the statutory liability attaches without regard to the precise nature of the effect thus produced.

The act does not suggest any discrimination in favor of losses due to mere physical deterioration of the commodity transported. It permits recovery for any loss to the property caused by the carrier, and it affords no support for a construction which would confine its remedy to losses of quantity or quality as distinguished from losses of value.

In the opinion, to which we have already referred, in the case of Adams Express Co. vs. Croninger it was said that "the constitutional power of Congress to regulate commerce among the states and with foreign nations comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment by defining the liability of the carrier for loss, delay, injury or damage to such property." It was suggested in the argument of the case at bar that the use of the word "delay" in the sentence just quoted indicates that the Supreme Court regarded that cause of loss as a separate and distinct ground of liability, and that as it is not specifically mentioned in the Carmack amendment it should be held to be excluded from the remedy therein provided. The quotations previously made from the opinion in the case cited show that the Supreme Court was proceeding upon the theory that the act under consideration was intended to apply generally to the subject of carrier liability, and the use of the term "delay" in that connection is a clear indication that the Court understood this legislation to cover cases in which loss to property received for carriage resulted from that cause. There are many instances in which physical deterioration of goods, as well as loss of value, results from delay in transportation, and it was evidently not the intention of Congress to place such cases beyond the scope and effect of the statute.

61 The case of the Gulf, etc., Railroad Co. vs. Nelson (Tex.) 139 S. W. 81, was cited in support of the contrary view.

In that case a shipment of machinery and equipment intended for construction work was delayed in transit and was delivered too late to be used profitably for that purpose. The carriers engaged in the transportation were sued jointly upon their common law liability for the loss sustained by the plaintiff in consequence of the delay. They made the contention that the only remedy available to the plaintiff was the one provided by the Carmack amendment to the Interstate Commerce Act. In disposing of this objection the Court said that the act did not in its opinion "apply where the damage claimed is not in reference to the property itself which is the subject of the transportation." As the property shipped in that case was not affected in its condition or value, it was held that the suit was properly based on the common law right of recovery rather than upon the Federal Statute. This decision is not at all at variance with our conclusion in the present case.

The bill of lading issued to the plaintiff for the carload of strawberries contained the stipulation "that no carrier is bound to transport such property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable dispatch, unless by specific agreement endorsed hereon." Upon the theory that the suit is for a failure to convey and deliver the berries

in time for the market of the Saturday following their receipt by the initial carrier, it is urged that the provision quoted from the bill of lading constitutes an effectual defense. The common law duty of the carrier was to transport with reasonable dispatch. The defendant could not limit by contract the liability for its failure to perform this duty, and no such limitation has in fact been attempted by the present bill of lading. Under the Carmack amendment the initial carrier is chargeable for the neglect of any connecting carrier to forward the shipment within a reasonable time, and there is an express prohibition against any exemption from this obligation." In *Missouri, K. & P. R. Co. vs. Harriman*, 226 U. S. 401,

62 the Supreme Court observed that: "The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence." It is not necessary to determine in this case whether a stipulation that the carrier shall not be bound to convey and deliver in time for a particular market is an attempt to avoid liability for negligence and as such is to be regarded as invalid. The ground of the action stated in the declaration is the failure to carry with reasonable dispatch, and the loss of marketability is mentioned as the element of damage. It is shown that the plaintiff's strawberries were forwarded on a regular berry train, which in due course of transit, would have reached its destination in time to admit of the sale of the berries in the market for which they were intended. The question, therefore, is not whether the carrier was required, in the absence of a stipulation to that effect, to transport the goods by a particular train or to deliver them in time for a particular market, but whether due diligence was used to insure the movement with reasonable dispatch of the train actually provided by the carrier for this shipment.

In *Balto. & Ohio R. Co. vs. Whitehill*, *supra*, it was said: "The carrier being bound to deliver in reasonable time, there could be no better standard for determining what was reasonable time, than comparison of the ordinary time taken, with that actually taken on that occasion." There is no evidence offered by the defendant carrier to explain and excuse the delay which is shown to have occurred in the transportation. Conditions might be supposed under which the most diligent action by the carrier might not secure delivery within a stipulated time. But in this case the proof tends to show that the duty to forward with reasonable dispatch has not been performed, and, under such circumstances as the present, the carrier cannot be exempted from liability merely because the consequence of the delay thus occurring was a loss of market value and not some other form of injury to the property. If the clause quoted from the bill of lading could be construed as in 63 consistent with such liability, it would be clearly ineffectual.

A proposal was made in the trial below to prove that the bill of lading was filed with the Interstate Commerce Commission as

required by law together with the published tariffs of the defendant, including regulations to the effect that if the shipper should elect not to have the property carried subject to all the terms and stipulations of the bill of lading, a rate would be chargeable ten per cent. in excess of that applying to carriage under its provisions. No such election was made by the plaintiff, and it is urged that his rights must therefore be governed by the contract into which he entered providing for the exemption of the carrier from liability for failure to deliver the shipment in time for a particular market. For the reasons already stated it is apparent that this contention cannot be sustained.

There is a provision in the bill of lading that "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid), at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such compensation whether or not such loss or damage occurs from negligence." Upon the assumption that under this provision of the contract of carriage the only measure of the plaintiff's recovery would be the value of the berries at the place and time of shipment, and in the absence of any proof of such value, the defendant sought to have the jury instructed that there was no evidence of any real or actual damage suffered by the plaintiff for which the defendant is liable, and that, therefore, though the jury should find that the berries were not transported and delivered with reasonable dispatch, only nominal damages could be recovered. This instruction was refused.

64 It is well settled that if the shipper obtains a lower rate upon an agreed valuation of the property, he is estopped to enforce a claim for loss upon the basis of a higher value contrary to the express terms of the agreement. Adams Express Co. vs. Croninger *suprs*; Kansas City Southern R. Co. vs. Carl, 226 U. S. 391; Missouri, K. & P. R. Co. vs. Harriman, *supra*; Wells, Fargo & Co. vs. Neiman-Marcus Co., 226 U. S. 267; Wolf vs. Adams Express Co., 106 Md. 472. In the case at bar the value of the berries as received for carriage is not specified in the bill of lading, but the provision is that the amount of loss or damage shall be computed on the basis of the value at the place and time of shipment. If the property had been injured or partially lost in transit, this case would have been analogous to those of N. Y. & Balto. Transport Co. vs. Baer, 118 Md. 73, and M. & M. Trans Co. vs. Eichberg, 109 Md. 211, in which the granting of an instruction in conflict with such an agreement as the present in reference to the measure of damages was held to be reversible error. If the berries had been totally lost or destroyed, recovery would have been restricted to their value at the time and place of shipment. Unless the stipulation in the bill of lading is to be altogether disregarded, the

carrier could not justly be charged with a greater loss to the property for delay in transit than would result from an absolute failure of delivery. The value of the berries as received for shipment would therefore seem to be a proper subject for inquiry in the determination of the carrier's liability. The ordinary measure of recovery would be the "decline in the market value between the time when they could have been sold, if they had been transported with due dispatch, and the time when they were actually sold." P. W. & B. R. Co. vs. Lehman, 56 Md. 209; Baltimore & Ohio R. Co. vs. Whitehill, *supra*. But if the plaintiff obtained a lower rate in consideration of his agreement that his loss should be computed on the basis of the actual value of the commodity as delivered to the carrier, it would seem to be reasonable, and in accordance with the principles of law applied in the decisions to which we have referred, that the contractual limitation thus defined and

65 supported should be observed. In order that the loss may be computed with reference to the value of the shipment as received by the carrier it is essential that evidence as to its value at that time and place should be produced. The purpose of such a computation in a case like the present would be to restrict the recoverable loss of market value within the shipping value with respect to which the carrier assumed responsibility.

But the instruction proposed by the defendant on this subject was erroneous because it embodied the theory that there was no evidence of any actual damage for which the defendant was liable. The measure of liability, as already indicated, was the loss of market value, and there was testimony as to the fact and extent of such loss. The offer of proof as to the original value of the berries would not have changed the basis of liability, but would simply have placed a limitation upon the amount of the recovery. The jury, therefore could not properly have been instructed that there was no proof of damage which they were entitled to consider.

The first instruction granted at the plaintiff's request, however, disregarded the measure of recovery we have indicated, and there was error also in the refusal of the trial Court to allow the defendant to prove its published tariffs filed with the Interstate Commerce Commission containing the regulations already mentioned providing for a higher rate if the shipments were not made subject to the terms and limitations of the bill of lading. But it is reasonably certain, in view of the jury's award, that there was no practical injury to the defendant from these rulings. The amount of the verdict was one hundred and eighty dollars and forty cents. It appears to have included an allowance of one hundred and fifty three dollars and sixty cents for loss of market value at the rate of two cents per quart for seventy-six hundred and eighty quarts in the consignment, and twenty-six dollars and eighty-eight cents as interest. The proof is that the decline in value due to the delay was from two to three cents per quart. The average price per quart at which the berries were sold was about six and a half cents. It may be judicially assumed that their value at the

66 time and place of shipment was at least equal to the two cents per quart which the jury allowed as damages, and in

the view we have taken of the case no just purpose would be served in reversing the judgment and subjecting the parties to the expense of a new trial.

One of the defendant's rejected prayers proposed to submit to the jury the question whether the plaintiff's carload of berries was forwarded to its destination with reasonable dispatch. The evidence tended to show without contradiction that the transportation was not in fact made with the expedition customary in that service as conducted by the carriers. The issue as to whether the berries were delivered without delay was submitted to the jury by an instruction granted at the plaintiff's instance, and as there was no countervailing proof in the record on this subject to support the theory of the defendant's prayer, there was no error in its rejection.

There is no occasion for a discussion in further detail of the various exceptions in the record, as the questions they involve are answered by the conclusions we have stated as to the principles by which the case is controlled.

Judgment affirmed with costs.

Filed January 13th, 1914.

67 Whereupon the following judgment of the Court was entered, to wit:

"1914 January 13" Judgment affirmed with costs.

Opinion by Burke, J."

Petition for Writ of Error.

In the Court of Appeals of the State of Maryland, October Term, 1913.

No. 44.

THE NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY,
a Corporation, Appellant,
vs.

THE PENINSULA PRODUCE EXCHANGE OF MARYLAND, a Corporation,
Appellee.

To the Honorable the Chief Judge of said Court:

The petition of the New York, Philadelphia & Norfolk Railroad Company, appellant in the above cause, by Miles & Myers, its attorneys, respectfully represents:

That on or about the 13th day of January, 1914, the Court of Appeals of the State of Maryland, made and entered a final order herein, in favor of the appellee, the Peninsula Produce Exchange of Maryland, against your petitioner, the New York, Philadelphia & Norfolk Railroad Company, appellant, in which and whereby, the Court of Appeals affirmed the judgment of the Circuit Court for Somerset County, in favor of the said, the Peninsula Produce Exchange of Maryland, plaintiff in said last named Court, and against

your petitioner, the New York, Philadelphia & Norfolk Railroad Company, defendant in said last named Court, for the sum of One Hundred and Eighty Dollars and Forty-eight Cents (\$180.48), with interest from the date of said judgment, to wit, the 24th day of April, 1913, and with costs. In this final order and judgment and proceedings had prior thereto in this Court, certain errors were committed to the prejudice and injury of the said New York, Philadelphia & Norfolk Railroad Company, petitioner herein, all of which will more in detail appear from the assignment of errors, which is herewith filed, and made a part of this petition; that the said Court of Appeals of Maryland, is the highest Court of the State in which a decision in this suit and in this matter can or could be had; that there was involved in said suit and in the said decision of the Court of Appeals of Maryland, certain questions involving the construction of certain Acts of Congress of the United States, regulating Inter-State Commerce, affecting shipments of merchandise from one State to another, all of which will more fully appear by reference to the assignment of error, herewith filed, as part of this petition, wherefore, the New York, Philadelphia & Norfolk Railroad Company, appellant and petitioner herein, prays and petitions—

That a writ of error from the Supreme Court of the United States may issue in its behalf, to the Court of Appeals of Maryland, for the correction of the errors so complained of, and that a transcript of the record of the proceedings in this case, duly authenticated, may be sent to the Supreme Court of the United States, to the end, that a complete record in said suit or matter may be removed into the Supreme Court of the United States, and the errors complained of by your petitioner, may be examined and corrected, and said judgment reversed, and your petitioner discharged.

And as in duty bound etc.,

Dated at Princess Anne, in Somerset County, Maryland, this 28th day of February, 1914.

Filed April 8th, 1914.

MILES & MYERS,
Attorneys for Appellant.

Order of Court.

Writ of error allowed upon the execution of a bond by the New York, Philadelphia & Norfolk Railroad Company, in the sum of three hundred dollars said bond, when approved to act as a supersedeas.

Dated at Annapolis, Maryland, this 18th day of March 1914.

A. HUNTER BOYD,
Chief Judge of the Court of Appeals of Maryland.

Filed April 8th 1914.

69 In the Court of Appeals of the State of Maryland, October Term, 1913.

No. 44.

THE NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY,
a Corporation, Appellant,

vs.

THE PENINSULA PRODUCE EXCHANGE OF MARYLAND, a Corporation,
Appellee.

Assignment of Errors.

The New York, Philadelphia & Norfolk Railroad Company, appellant in the above cause, in connection with, and as part of its petition for a writ of error, filed herewith, makes the following assignment of errors, which it avers were committed by the above named Court, and by the Circuit Court for Somerset County, Maryland, in the affirmance and rendition, respectively, of the judgment against this appellant, appearing upon the record herein, that is to say:

(1) That the Court of Appeals of Maryland erred in affirming the ruling of the Circuit Court for Somerset County, Maryland, in over-ruling the demurrer of the New York, Philadelphia & Norfolk Railroad Company, defendant in the last named Court, to the declaration of the Peninsula Produce Exchange, plaintiff in said Court, the declaration of the said plaintiff being as follows:

"The Peninsular Produce Exchange of Maryland, a corporation, incorporated under the laws of Maryland, by Melvin & Handy, Ellegood, Freeny & Wailes and H. Fillmore Lankford, its attorneys, sues the New York, Philadelphia & Norfolk Railroad Company, a Corporation incorporated under the laws of the State of Maryland, and holding and exercising franchises therein as well as in other States of the United States, for that the said defendant is engaged as a common carrier for hire in the transportation of goods, wares and merchandise and farm products and other property between points in the State of Maryland and points in the State of Pennsylvania and other States of the United States, and as such common carrier is subject to the provisions of the Act of Congress of the United States to regulate commerce approved February 4th, 1887, and Acts amendatory thereof or supplementary thereto. And that the plaintiff did, on or about the 26th day of May, 1910, deliver to the said defendant at its Railroad Station at Marion, in Somerset County, Maryland, one car of strawberries, containing two hundred and forty thirty-two quart crates, that is to say, seventy six 70 hundred and eighty-one quarts of strawberries, and five five-eighths baskets of peas, which said strawberries and peas were consigned to H. Warne & Son, New York City, in the State of New York, which said strawberries were received at the station aforesaid by the said New York, Philadelphia & Norfolk Railroad Company

for transportation for hire, to the said City of New York, over and by way of its lines or railroad, and over other connecting railroad lines, operating as common carriers for hire to be paid by the plaintiff, and the plaintiff says that the said strawberries and peas were to be transported with safety, and with reasonable dispatch, and delivered to the said H. Warne & Son in safe condition and with reasonable diligence, but the said defendant, or its connecting lines or the terminal line, to wit, the Pennsylvania Railroad Company, a corporation incorporated under the laws of the State of Pennsylvania, and a common carrier for hire as aforesaid, did not, with safety and with due diligence, dispatch or forward the said strawberries, or transport or deliver the same with reasonable dispatch and in a safe condition as they were in duty bound to do, but detained the same by reason of which detention and delay in transportation and delivery, the said strawberries and peas were damaged, and failed to reach their point of destination in the City of New York, until too late for the market of the day for which they were shipped and received as aforesaid and for which they would have arrived in due time, if the said defendant and the connecting and terminal lines or Railroads had used due and reasonable diligence in the transportation and in the delivery thereof to the said H. Warne & Son, and because of the said delay and detention of the said strawberries, they were greatly damaged, and a large shrinkage in the value of the said strawberries took place, both because of the deterioration of their condition and because of the decline in the market value or price of the said straw-berries and the plaintiff was greatly damaged and suffered loss because said straw-berries were not delivered with reasonable dispatch by the said common carriers on the day of the market for which they were transported.

And the plaintiff claims therefor the sum of four hundred dollars damages."

Whereas, the said demurrer of the defendant should have been sustained, and the judgment of the said Circuit Court for Somerset County in this case should have been reversed by the said Court of Appeals of Maryland.

(2) That the Court of Appeals of Maryland erred in sustaining the ruling of the said Circuit Court for Somerset County, in granting the first prayer of the said Peninsula Produce Exchange, the plaintiff in said last named Court, and in rejecting the 1st, 2nd and 5th prayers of the defendant, viz.,

"Plaintiff's First Prayer. The plaintiff prays the Court to instruct the jury that if they believe from the evidence that the Peninsula Produce Exchange delivered to the New York, Philadelphia & Norfolk Railroad Company, at Marion Station, in Somerset County, Maryland, one of its stations in said County, on the 26th day of May, 1910, a carload of strawberries in good condition, said car containing two hundred and forty crates of straw-berries, of

71 thirty-two quarts each, consigned to H. Warne & Son, at New York City, in the State of New York, and that said railroad company received said berries and issued the bill of lading therefor offered in evidence, to be transported over its line and connecting

railroad lines, to be delivered to said H. Warne & Sons, then it became the duty of said defendant and all connecting lines to use reasonable care, diligence and exertion, in forwarding, transporting and delivering said berries to the said H. Warne & Sons, and if the jury shall believe that said defendant and the connecting railroad lines, or any of them, did not use such care, diligence and exertion in forwarding, transporting and delivering the said berries and shall further find that by reason of the failure of said New York, Philadelphia and Norfolk Railroad Company, and the connecting railroad lines, or any of them, to use such care, diligence and exertion, the said berries arrived at their destination in New York City too late for the market of the day for which they were received and transported by the defendant and the connecting railroad lines, that is to say, too late for the market of the day on which they would have arrived if they had been forwarded and transported with such care, diligence and exertion, and that the plaintiff thereby sustained loss, then their verdict should be for the plaintiff, and they may embrace in their verdict any loss which they find to have been sustained by the plaintiff from the decline in the market value between the time when said berries could have been sold if they had been transported with due dispatch, and the time when they were actually sold."

"Defendant's First Prayer.—The defendant prays the court to instruct the jury that, under the pleadings and evidence in this case there is no legally sufficient evidence to entitle the plaintiff to recover, and that their verdict must be for the defendant."

"Defendant's Second Prayer.—The defendant prays the Court to instruct the jury that, under the pleadings and evidence in this case, there is no legally sufficient evidence of any delay occurring on the line of the defendant, and that their verdict must be for the defendant."

"Defendant's Fifth Prayer.—The defendant prays the Court to instruct the jury that the provisions of the amendment to the Interstate Commerce Act, customarily known as the Carmack Amendment, do not impose on the carrier receiving a shipment in one state for transportation to another state liability for delay which occurred not on its line but on the line of a succeeding carrier into whose possession the goods may be delivered for movement to or in the direction of destination."

Because no evidence was produced to show any delay occurring on the line of the defendant, and because the undisputed testimony shows that no actual physical deterioration was suffered by the shipment, either upon the line of the defendant or upon any of its connecting lines, and because the Act of Congress of the United States, known as the "Carmack Amendment" to the "Hepburn Act", or any other Act of Congress of the United States or of the General Assembly of Maryland, does not impose liability upon the initial

72 carrier for delay, occurring upon the line of a connecting carrier, where such delay does not result in actual loss or damage or injury to the article shipped. Wherefore, plaintiff's 1st prayer ought to have been rejected and defendant's 1st, 2nd and 5th prayers ought to have been granted, and the said judgment of

the Circuit Court for Somerset County, Maryland, ought to have been reversed by the said Court of Appeals of Maryland.

(3) The Court of Appeals of Maryland erred in sustaining the rulings of the said Circuit Court for Somerset County, Maryland, in rejecting the defendant's 3rd, 4th and 6th prayers, which said prayers were as follows:

"Defendant's Third Prayer.—If the jury believe from the evidence, that, at the time the shipment of berries mentioned in the declaration in this case was delivered to the defendant, the defendant issued therefor to the plaintiff the bill of lading offered in evidence in this case, and shall further find that the said defendant did not transport and deliver the said berries with reasonable dispatch and shall further find that between the time when said berries should have arrived at their destination, had they been transported with reasonable dispatch, and the time at which they actually did arrive, there was a fall in the market price of said berries and that by reason of the fall in the market price, the plaintiff suffered loss, then the plaintiffs are entitled to recover nominal damages, only, provided the jury further find that the said shipment of berries was delivered by the defendant or its connecting line to the consignee at destination in sound and marketable condition, and that the said berries suffered no loss, damage or injury before delivery to consignee."

"Defendant's Fourth Prayer.—The defendant prays the Court to instruct the jury that there is no evidence of any real or actual damage suffered by the plaintiff for which the defendant is liable under the contract of shipment produced in evidence in this case, and that, even though the jury may find that the berries mentioned in the declaration were not transported and delivered with reasonable dispatch the plaintiff can recover only such trifling and insubstantial damages as the law calls nominal damages."

"Defendant's Sixth Prayer.—The defendant prays the Court to instruct the jury that the uncontradicted evidence in the case shows that the tariffs of the defendant, duly published and on file with the Interstate Commerce Commission, published two rates available in connection with shipments of strawberries, the one available if the shipment was transported under the terms of the bill of lading which terms are set forth in the tariffs; the other a rate of ten per cent higher, which was available if the shipment was transported under the common law liability of the carrier, that the shipment which is the subject matter of this section was transported under the former and lower rate and subject to the terms and conditions of the bill of lading as published in the tariffs, and a bill of lading containing these terms and conditions was duly issued by the carrier, as required

73 by law, upon receipt of the shipment. In determining what damages, if any, the complainant is entitled to recover in this action, the jury must be guided entirely by the terms and conditions of the bill of lading, since the reasonableness of its terms and conditions may not be questioned in this Court."

Because the undisputed testimony shows, that the inter-state shipment of produce, which forms the basis of the action in this case, was

forwarded under a written contract, evidenced by the bill of lading, set forth in the record which said written contract or bill of lading contains the following provisions: "No carrier is bound to transport said property * * * in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement, endorsed herein", and the further provision that "the amount of any loss or damage for which any carrier is liable, shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the time and place of shipment, under the bill of lading unless a lower value has been represented in writing." No evidence was produced to show the value of the articles shipped at the time and place of shipment, and no evidence of any damage suffered by the plaintiff was offered except the alleged damage due to the failure of the defendant and its connections to deliver the shipment in time for the market for which the plaintiff claimed it was intended, and under the above provision of the bill of lading such damage is not recoverable.

Wherefore, the defendant's 3rd, 4th and 6th prayers ought to have been granted, and the said judgment of the Circuit Court for Somerset County, Maryland, ought to have been reversed by the said Court of Appeals of Maryland.

(4) The Court of Appeals of Maryland erred in sustaining the action of the said Circuit Court for Somerset County, Maryland, rejecting the defendant's 7th prayer, which said 7th prayer is as follows:

"Defendant's Seventh Prayer.—The defendant prays the Court to instruct the jury that the defendant corporation was not bound,

74 under its contract with the plaintiff, as shown by the bill of lading in evidence, to deliver the berries of the plaintiff by

any particular train or in time for any particular market, or otherwise than with reasonable dispatch, and if the jury shall find, from the evidence that the train carrying the berries referred to in the testimony, arrived at the point of destination with reasonable dispatch, and during the market hours, on the day following the start of said train, from Delmar, Delaware, as was usual with such trains, if the jury find that this was usual then their verdict must be for the defendant, although the jury may find that the berries of the plaintiff would have sold at a higher price if they had been received at an earlier hour of the same market day."

Because under the provisions of the bill of lading set forth in the 3rd assignment of error, above, the defendant Company did not undertake the shipment "in time for any particular market or otherwise than with reasonable dispatch", and the jury should have been so instructed. Wherefore, said Court ought to have granted defendant's said prayer, and the judgment of said Circuit Court for Somerset County in the said cause ought to have been reversed by the said Court of Appeals of Maryland.

(5) All the questions involving the liability of an initial carrier in an inter-state shipment, set forth in the foregoing assignment of

errors, were directly raised by the appellant, the New York, Philadelphia & Norfolk Railroad Company, in the said Court of Appeals of Maryland, by exceptions to the rulings of the said Circuit Court for said Somerset County, upon its action in granting the said plaintiff's 1st prayer and in rejecting the defendant's said seven prayers and in overruling the demurrer of the defendant, the New York, Philadelphia & Norfolk Railroad Company, to the declaration of the plaintiff, the said Peninsula Produce Exchange, as will appear by reference to the record in the proceedings in the said Court of Appeals of Maryland.

MILES & MYERS,
Attorneys for Appellant.

Filed April 8th, 1914.

75 *Bond and Approval Thereon.*

Know all men by these presents, That we, the New York, Philadelphia & Norfolk Railroad Company, a corporation, as principal and American Surety Company of New York, as surety, are held and firmly bound unto the Peninsula Produce Exchange of Maryland, a corporation, in the full and just sum of three hundred dollars (\$300), to be paid to the said Peninsula Produce Exchange of Maryland, its certain attorney, successors or assigns, to which payment well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents, sealed with our seals, and dated this 28th day of March, in the year nineteen hundred and fourteen.

Whereas, The above bounden, the New York, Philadelphia & Norfolk Railroad Company, as plaintiff in error, is prosecuting a writ of error in the Supreme Court of the United States, to reverse a judgment rendered in the suit of the New York, Philadelphia & Norfolk Railroad Company, appellant against the Peninsula Produce Exchange of Maryland, Appellee, by the Court of Appeals of Maryland, the same being No. 44, on the Docket of the October Term, 1913, in said last named Court.

Now the condition of the above obligation, is such that if the said New York, Philadelphia & Norfolk Railroad Company shall prosecute its said writ of error with effect, and answer all costs and damages, if it shall fail to make good its plea, then the above obligation to be void; otherwise to remain in full force and virtue.

Witness the hand of William A. Patton, President of the New York, Philadelphia & Norfolk Railroad Company, and the corporate seal thereof, and the hand of Edw. P. Bailey, Resident Vice-President of the American Surety Company of New York and the

corporate seal thereof, this the day and year first above written.

76

W. A. PATTON,
President New York, Philadelphia & Norfolk R. R. Co.

Attest:

J. W. C. ROUSSE, *Secretary.*

[Seal's Place.]

AMERICAN SURETY COMPANY OF
NEW YORK,
By EDW. P. BAILEY,
Resident Vice-President.

[Seal's Place.] 55403.

Attest:

M. E. NEVILLE,
Resident Assistant Secretary.

Approved by

A. HUNTER BOYD,
Chief Judge of the Court of Appeals of Maryland.

Filed April 8th, 1914.

77 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the
Judges of the Court of Appeals of Maryland, Greeting:

[Seal United States District Court, Maryland.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Maryland, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The New York, Philadelphia and Norfolk Railroad Company, a Corporation, Appellant, and The Peninsula Produce Exchange of Maryland, a Corporation, Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction

78 of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The New York, Philadelphia and Norfolk Railroad Company, a corporation, Appellant, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send your record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 27th day of March, in the year of our Lord one thousand nine hundred and fourteen.

ARTHUR L. SPAMER,
*Clerk of the District Court of the United States
 for the District of Maryland.*

[Seal United States District Court, Maryland.]

Allowed by

A. HUNTER BOYD,
Chief Judge of the Court of Appeals of Maryland.

[Endorsed:] Original Writ of Error. Filed April 8th, 1914.

79 UNITED STATES OF AMERICA, *ss.*:

To the Peninsula Produce Exchange of Maryland, a corporation,
 Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the State of Maryland, wherein the New York, Philadelphia & Norfolk Railroad Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable A. Hunter Boyd, Chief Judge of the Court of Appeals of Maryland, this 27th day of March, in the year of our Lord one thousand nine hundred and fourteen.

A. HUNTER BOYD,

Chief Judge of the Court of Appeals of Maryland.

30 Service of the within citation acknowledged this 4th day of April, 1914.

ELLEGOOD, FRENEY
 & WAILES,

Att'y's for Pen. Produce Exchange.

Citation. Filed April 8th, 1914.

50 N. Y., P. & N. R. R. CO. VS. PENIN. PRODUCE EX. OF MD.

81 STATE OF MARYLAND, *scit:*

I, C. C. Magruder, Clerk of the Court of Appeals of the State of Maryland do hereby certify that the said Court is the highest Court of Law and Equity in said State in which a decision can be had.

I further certify that the foregoing is a true transcript of record, opinion of the Court and judgment entered thereon, petition for writ of error, assignment of errors and order of Court thereon, and Bond with approval thereon endorsed, in the case there stated.

And in obedience to the command of the within writ I now transmit said transcript of record together with the original writ of error and the original citation attached in said cause to the Supreme Court of the United States.

In Testimony Whereof I hereunto subscribe my name and the seal of the Court of Appeals, of Maryland affix this twenty-fourth day of April, A. D. 1914.

[Seal Court of Appeals, Maryland.]

C. C. MAGRUDER,
Clerk of the Court of Appeals of Maryland.

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Test:

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17
No. 137.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1915. U. S.

FILED

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JAMES P. MAHER
CLERK

THE NEW YORK, PHILADELPHIA & NORFOLK
RAILROAD COMPANY, Plaintiff in Error,

v.s.

THE PENINSULA PRODUCE EXCHANGE OF
MARYLAND.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF
MARYLAND.

BRIEF OF PLAINTIFF IN ERROR.

HENRY WOLF BIKLÉ,
FREDERIC D. MCKENNEY,
For Plaintiff in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1915. No. 137.

The New York, Philadelphia & Norfolk Railroad Company, Plaintiff in Error,

vs.

The Peninsula Produce Exchange of Maryland.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF OF PLAINTIFF IN ERROR..

STATEMENT OF THE CASE.

The Defendant in Error in this case, The Peninsula Produce Exchange of Maryland, brought this action against the New York, Philadelphia & Norfolk Railroad Company, to recover for alleged delay in the transportation of a shipment of 240 thirty-two-quart crates of strawberries and

5 five-eighths baskets of peas delivered by the Produce Exchange to the Railroad at its station at Marion, Maryland, on May 26th, 1910, consigned to H. Watne & Son, New York City. The testimony disclosed that the New York, Philadelphia & Norfolk Railroad Company transported the car from Marion, Maryland, to Delmar (a point on the boundary line between Delaware and Maryland), and there turned it over to the Delaware Railroad, which is stated to be a leased part of the Pennsylvania Railroad, by which it was transported to Jersey City, for the New York market.

There was no delay on the line of the Defendant, as appears by the undisputed evidence of the Plaintiff's witness, Winter C. Cullen, who testified that he had been shown "the time book" by the trainmaster of the New York, Philadelphia & Norfolk Railroad Company, and that "the train" carrying the car in question "was due to arrive at Jersey City sometime on the evening of the 27th, having left Delmar [the terminus of the Defendant's railroad] at eight o'clock on the morning of the 27th, that it was due to arrive at Jersey City between nine and eleven o'clock" (Record, page 6). There is some confusion in the testimony as to the hour of arrival at Jersey City, but, in view of the verdict of the jury, it must be assumed that it arrived after "market hours." The opinion of the Court of Appeals of Maryland puts the arrival "about six hours later than the customary time of arrival," and this is a fair conclusion from the testimony.

Part of the shipment was sold that day and part of it was sold later. Witnesses on behalf of the Plaintiff testified that the best New York market for berries at New York was "between one and two o'clock in the morning" (page 12); that "after this there is nothing doing." This testimony was supplemented by testimony to the effect that the prices obtaining at the time the car of berries in question arrived were less than obtained during the earlier part of the night, that is to say, about one o'clock, and that the prices actually realized were less than might have been realized at that time. There was no evidence

that the property was physically damaged as a result of the alleged delay.

The Plaintiff introduced in evidence the bill of lading issued by the New York, Philadelphia & Norfolk Railroad Company for the shipment, which, in Section 3 of the conditions thereof, contained the provision:

"No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable despatch, unless by specific agreement endorsed hereon."

The trial Court refused to permit proof on behalf of the Defendant that the Defendant offered two different rates applicable on the property in question, one applying in connection with shipments made under the regulations and conditions contained in the bill of lading on which this shipment was made; the other a rate 10 per cent. higher, carrying with it the liability imposed upon carriers by the common law, and the Federal and State statutes applicable thereto: and that the offer of these rates and all the conditions applicable in connection with freight shipped thereunder, including the conditions and regulations of the form of bill of lading under which this shipment moved, were contained in tariffs duly on file with the Interstate Commerce Commission.

The questions involved are two:—

1. Does the Carmack Amendment impose on the "initial carrier" liability for delay occurring on the line of its connection without physical damage to the property?

2. Was the Plaintiff entitled to recover because its shipment failed to arrive in time for the market of May 28th, when the regulations under which the shipment moved were published in tariffs duly on file with the Interstate Commerce Commission, and specifically provided: "No carrier

is bound to transport said property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable despatch, unless by specific agreement endorsed hereon"?

These questions were duly raised in the trial Court by the Defendant, the first by the Defendant's first, second and fifth prayers, the second by the Defendant's third, fourth and sixth prayers. The first question is also raised by the action of the Court upon the Defendant's demurrer to the Plaintiff's declaration, and by the trial Court's action in granting the Plaintiff's first prayer.

SPECIFICATIONS OF ERROR.

The New York, Philadelphia & Norfolk Railroad Company, Appellant in the above cause, in connection with, and as part of its petition for a writ of error, filed herewith, makes the following assignment of errors, which it avers were committed by the above named Court, and by the Circuit Court for Somerset County, Maryland, in the affirmance and rendition, respectively, of the judgment against this Appellant, appearing upon the record herein, that is to say:—

1. That the Court of Appeals of Maryland erred in affirming the ruling of the Circuit Court for Somerset County, Maryland, in overruling the demurrer of the New York, Philadelphia & Norfolk Railroad Company, Defendant in the last named Court, to the declaration of the Peninsula Produce Exchange, Plaintiff in said Court, the declaration of the said Plaintiff being as follows:—

"The Peninsular Produce Exchange of Maryland, a corporation, incorporated under the laws of Maryland, by Melvin & Handy, Ellegood, Freeny & Wailes and H. Fillmore Lankford, its attorneys, sues the New York, Philadelphia & Norfolk Railroad Company, a cor-

poration incorporated under the laws of the State of Maryland, and holding and exercising franchises therein as well as in other States of the United States, for that the said Defendant is engaged as a common carrier for hire in the transportation of goods, wares and merchandise and farm products and other property between points in the State of Maryland and points in the State of Pennsylvania and other States of the United States, and as such common carrier is subject to the provisions of the Act of Congress of the United States to regulate commerce approved February 4th, 1887, and Acts amendatory thereof or supplementary thereto. And that the Plaintiff did, on or about the twenty-sixth day of May, 1910, deliver to the said Defendant at its railroad station at Marion, in Somerset County, Maryland, one car of strawberries, containing two hundred and forty thirty-two quart crates, that is to say, seventy-six hundred and eighty-one quarts of strawberries, and five five-eighths baskets of peas, which said strawberries and peas were consigned to H. Warne & Son, New York City, in the State of New York, which said strawberries were received at the station aforesaid by the said New York, Philadelphia & Norfolk Railroad Company for transportation for hire, to the said City of New York, over and by way of its lines or railroad, and over other connecting railroad lines, operating as common carriers for hire to be paid by the Plaintiff, and the Plaintiff says that the said strawberries and peas were to be transported with safety, and with reasonable despatch, and delivered to the said H. Warne & Son in safe condition and with reasonable diligence, but the said Defendant, or its connecting lines or the terminal line, to wit, the Pennsylvania Railroad Company, a corporation incorporated under the laws of the State of Pennsylvania, and a common carrier for hire as aforesaid, did not, with safety and due diligence, despatch or forward the said strawberries, or transport or deliver the same

with reasonable dispatch and in a safe condition as they were in duty bound to do, but detained the same by reason of which detention and delay in transportation and delivery, the said strawberries and peas were damaged, and failed to reach their point of destination in the City of New York, until too late for the market of the day for which they were shipped and received as aforesaid and for which they would have arrived in due time, if the said Defendant and the connecting and terminal lines or railroads had used due and reasonable diligence in the transportation and in the delivery thereof to the said H. Warne & Son, and because of the said delay and detention of the said strawberries they were greatly damaged, and a large shrinkage in the value of the said strawberries took place, both because of the deterioration of their condition, and because of the decline in the market value or price of the said strawberries, and the Plaintiff was greatly damaged and suffered loss because said strawberries were not delivered with reasonable despatch by the said common carriers on the day of the market for which they were transported.

“And the Plaintiff claims therefore the sum of \$400 damages.”

Whereas, the said demurrer of the Defendant should have been sustained, and the judgment of the said Circuit Court for Somerset County in this case should have been reversed by the said Court of Appeals of Maryland.

2. That the Court of Appeals of Maryland erred in sustaining the ruling of the said Circuit Court for Somerset County, in granting the first prayer of the said Peninsula Produce Exchange, the Plaintiff in said last named Court, and in rejecting the first, second and fifth prayers of the Defendant, viz. :—

“PLAINTIFF’S FIRST PRAYER.—The Plaintiff prays the Court to instruct the jury that if they shall believe

from the evidence that the Peninsula Produce Exchange delivered to the New York, Philadelphia & Norfolk Railroad Company, at Marion Station, in Somerset County, Maryland, one of its stations in said county, on the twenty-sixth day of May, 1910, a carload of strawberries in good condition, said cars containing two hundred and forty crates of strawberries, of thirty-two quarts each, consigned to H. Warne & Son, at New York City, in the State of New York, and that said railroad company received said berries and issued the bill of lading therefor offered in evidence, to be transported over its line and connecting railroad lines to be delivered to said H. Warne & Sons, then it became the duty of said Defendant and all connecting lines to use reasonable care, diligence and exertion, in forwarding, transporting and delivering said berries to the said H. Warne & Sons, and if the jury shall believe that said Defendant and the connecting railroad lines, or any of them, did not use such care, diligence and exertion in forwarding, transporting and delivering the said berries and shall further find that by reason of the failure of said New York, Philadelphia & Norfolk Railroad Company, and the connecting railroad lines, or any of them, to use such care, diligence and exertion, the said berries arrived at their destination in New York City too late for the market of the day for which they were received and transported by the defendant and the connecting railroad lines, that is to say, too late for the market of the day on which they would have arrived if they had been forwarded and transported with such care, diligence and exertion, and that the Plaintiff thereby sustained loss, then their verdict should be for the Plaintiff, and they may embrace in their verdict any loss which they find to have been sustained by the Plaintiff from the decline in the market value between the time when said berries could have been sold if they had been transported with due dispatch, and the time when they were actually sold.

"DEFENDANT'S FIRST PRAYER.—The Defendant prays the Court to instruct the jury that, under the pleadings and evidence in this case there is no legally sufficient evidence to entitle the Plaintiff to recover, and that their verdict must be for the Defendant.

"DEFENDANT'S SECOND PRAYER.—The Defendant prays the Court to instruct the jury that, under the pleadings and evidence in this case, there is no legally sufficient evidence of any delay occurring on the line of the defendant, and that their verdict must be for the Defendant.

"DEFENDANT'S FIFTH PRAYER.—The Defendant prays the Court to instruct the jury that the provisions of the amendment to the Interstate Commerce Act, customarily known as the Carmack Amendment, do not impose on the carrier receiving a shipment in one State for transportation to another State liability for delay which occurred not on its line but on the line of a succeeding carrier into whose possession the goods may be delivered for movement to or in the direction of destination."

Because no evidence was produced to show any delay occurring on the line of the Defendant, and because the undisputed testimony shows that no actual physical deterioration was suffered by the shipment, either upon the line of the Defendant or upon any of its connecting lines, and because the Act of Congress of the United States, known as the "Carmack Amendment" to the "Hepburn Act," or any other Act of Congress of the United States, or of the General Assembly of Maryland, does not impose liability upon the initial carrier for delay, occurring upon the line of a connecting carrier, where such delay does not result in actual loss or damage or injury to the article shipped. Wherefore, Plaintiff's first prayer ought to have been rejected and Defendant's first, second and fifth prayers ought to have been granted, and the said judgment of the Circuit Court for Somerset County, Maryland, ought to have been reversed by the said Court of Appeals of Maryland.

3. The Court of Appeals of Maryland erred in sustaining the rulings of the said Circuit Court for Somerset County, Maryland, in rejecting the Defendant's third, fourth and sixth prayers, which said prayers were as follows:—

"DEFENDANT'S THIRD PRAYER.—If the jury believe from the evidence, that, at the time the shipment of berries mentioned in the declaration in this case was delivered to the Defendant, the Defendant issued therefor to the Plaintiff the bill of lading offered in evidence in this case, and shall further find that the said Defendant did not transport and deliver the said berries with reasonable dispatch and shall further find that between the time when said berries should have arrived at their destination, had they been transported with reasonable dispatch, and the time at which they actually did arrive, there was a fall in the market price of said berries and that by reason of the fall in the market price, the Plaintiff suffered loss, then the Plaintiffs are entitled to recover nominal damages, only, provided the jury further finds that the said shipment of berries was delivered by the Defendant or its connecting line to the consignee at destination in sound and marketable condition, and that the said berries suffered no loss, damage or injury before delivery to consignee.

"DEFENDANT'S FOURTH PRAYER.—The Defendant prays the Court to instruct the jury that there is no evidence of any real or actual damage suffered by the Plaintiff for which the Defendant is liable under the contract of shipment produced in evidence in this case, and that, even though the jury may find that the berries mentioned in the declaration were not transported and delivered with reasonable dispatch the Plaintiff can recover only such trifling and insubstantial damages as the law calls nominal damages.

"DEFENDANT'S SIXTH PRAYER.—The Defendant prays the Court to instruct the jury that the uncontradicted evidence in the case shows that the tariffs of

the Defendant, duly published and on file with the Interstate Commerce Commission, published two rates available in connection with shipments of strawberries, the one available if the shipment was transported under the terms of the bill of lading which terms are set forth in the tariffs; the other a rate of ten per cent. higher, which was available if the shipment was transported under the common law liability of the carrier, that the shipment which is the subject matter of this section was transported under the former and lower rate and subject to the terms and conditions of the bill of lading as published in the tariffs, and a bill of lading containing these terms and conditions was duly issued by the carrier, as required by law, upon receipt of the shipment. In determining what damages, if any, the complainant is entitled to recover in this action, the jury must be guided entirely by the terms and conditions of the bill of lading, since the reasonableness of its terms and conditions may not be questioned in this Court."

Because the undisputed testimony shows, that the interstate shipment of produce, which forms the basis of the action in this case, was forwarded under a written contract, evidenced by the bill of lading, set forth in the record which said written contract or bill of lading contains the following provisions: "No carrier is bound to transport said property * * * in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement, endorsed herein," and the further provision that "the amount of any loss or damage for which any carrier is liable, shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment, under the bill of lading unless a lower value has been represented in writing." No evidence was produced to show the value of the articles shipped at the time and place of shipment, and no evidence of any

damage suffered by the Plaintiff was offered except the alleged damage due to the failure of the Defendant and its connections to deliver the shipment in time for the market for which the Plaintiff claimed it was intended, and under the above provision of the bill of lading such damage is not recoverable.

Wherefore, the Defendant's third, fourth and sixth prayers ought to have been granted, and the said judgment of the Circuit Court for Somerset County, Maryland, ought to have been reversed by the said Court of Appeals of Maryland.

4. The Court of Appeals of Maryland erred in sustaining the action of the said Circuit Court for Somerset County, Maryland, rejecting the Defendant's seventh prayer, which said seventh prayer is as follows:—

"DEFENDANT'S SEVENTH PRAYER.—The Defendant prays the Court to instruct the jury that the Defendant corporation was not bound, under its contract with the plaintiff, as shown by the bill of lading offered in evidence, to deliver the berries of the Plaintiff by any particular train or in time for any particular market or otherwise than with reasonable dispatch, and if the jury shall find from the evidence that the train carrying the berries referred to in the testimony, arrived at the point of destination with reasonable dispatch, and during the market hours, on the day following the start of said train, from Delmar, Delaware, as was usual with such trains, if the jury find that this was usual then their verdict must be for the Defendant, although the jury may find that the berries of the Plaintiff would have sold at a higher price if they had been received at an earlier hour of the same market day."

Because under the provisions of the bill of lading set forth in the third assignment of error, above, the Defendant Company did not undertake the shipment "in time for

any particular market or otherwise than with reasonable dispatch," and the jury should have been so instructed. Wherefore, said Court ought to have granted Defendant's said prayer, and the judgment of said Circuit Court for Somerset County in the said cause ought to have been reversed by the said Court of Appeals of Maryland.

5. All the questions involving the liability of an initial carrier in an interstate shipment, set forth in the aforesaid assignment of errors, were directly raised by the Appellant, the New York, Philadelphia & Norfolk Railroad Company, in the said Court of Appeals of Maryland, by exceptions to the rulings of the said Circuit Court for said Somerset County, upon its action in granting the said Plaintiff's first prayer and in rejecting the Defendant's said seven prayers and in overruling the demurrer of the Defendant the New York, Philadelphia & Norfolk Railroad Company, to the declaration of the Plaintiff, the said Peninsula Produce Exchange, as will appear by reference to the record in the proceedings in the said Court of Appeals of Maryland.

ARGUMENT.

1. Does the Carmack Amendment impose on the "initial carrier" liability for delay occurring on the line of its connection, without physical damage to the property?

While it is well settled in this Court that a carrier accepting property consigned to a point beyond its own line is not liable for the transportation of the property after it leaves its rails, in the absence of express agreement to assume such responsibility (*Railroad Company vs. Manufacuring Co.*, 16 Wallace, 318, 1872; *Railroad Company vs. Pratt*, 22 Wallace, 123, 1874) in the present proceeding, there is an express stipulation against the assumption of such liability, except as it has been imposed by law. It follows, therefore, that the Plaintiff in Error is under no liability to the shipper unless the Carmack Amendment is sufficiently broad in its scope to include liability for delay occurring on the line of a connection.

Myrick vs. Michigan Central R. R. Co., 107 U. S. 102 (1882);

Wabash R. R. Co. vs. Pearce, 192 U. S. 179 (1904).

The liability imposed by the Carmack Amendment upon an initial carrier, while a through liability, is not the same through liability which, at the common law, would devolve upon such carrier in connection with transportation wholly over its own rails. It is elementary that the common law liability in connection with loss, damage, or injury to the property, extended to many cases in which such loss, damage, or injury resulted entirely without negligence on the part of the carrier. In other words, this so-called extraordinary liability existed even where such loss, damage or injury was in no way caused by the carrier, but where it was caused by some outside and even uncontrollable agency except in the specific cases in which the law itself excused

the carrier, viz., where such loss, damage or injury was due to the act of God, the act of the public enemy, the act of the shipper, the act of the law, or the nature of the goods. The Carmack Amendment carefully confines the liability imposed on the initial carrier to loss, damage or injury *caused* by it or by any common carrier, railroad or transportation company, to which such property may be delivered or over whose line or lines such property may pass, and this liability is not co-extensive with the common law liability of the individual carriers.

This view is recognized by this Court in *G. H. & S. A. Railway Company vs. Wallace*, 223 U. S., 481, at page 491, and the significance of the word "caused" was emphasized in the case of *Kansas City Southern Ry. vs. C. & I.*, 227 U. S. 639 (1913), at page 649.

The question, therefore, in a case brought against the initial carrier under the Carmack Amendment is not whether the facts disclose liability on some one or other of the carriers involved in the transportation, but whether the specific cause of action is within the language of the statute.

The language of the Carmack Amendment is as follows:—

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transporta-

tion company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

The question in this case is whether the liability for "loss, damage, or injury to the goods" is sufficiently comprehensive to include a liability for delay. In considering this question it seems advisable to do so with a recognition of the fact that the quoted words of the Amendment may be intended to refer either to the *cause of action* which is made the subject of suit, or to the *elements of damage* for which suit may be brought. If the first interpretation be adopted, and if the words are not sufficiently comprehensive to include delay as a cause of action, the initial carrier could not be held liable under the Amendment for physical damage to the property occurring as a result of delay on the line of its connection. On the other hand, if the words are intended to indicate the elements of damage for which suit may be brought against the initial carrier, then that carrier might be held liable for delay on the line of its connection if such delay caused damage to the property. It seems proper, therefore, to consider the subject in this dual aspect.

(a) In the present case the *cause of action* is alleged delay in transit, so that the berries, as stated in the Plaintiff's declaration, "failed to reach their point of destination * * * until too late for the market of the day for which they were shipped and received as aforesaid;" and the testimony shows that if such delay occurred, it occurred after the shipment left the rails of the Plaintiff in Error.

Now, from the earliest times the liability for delay has been an entirely different and distinct liability from that for loss, damage or injury to the property. The latter liability has been the unique liability shared by the carrier and the innkeeper. (See Holmes' Common Law, Chapter 5,

and Professor Beale's article 11 *Harvard Law Review*, 158.) This liability required the carrier to answer at all events for the safety of the property except in those situations for which the law itself created excuses, viz., the act of God, the act of the public enemy, the act of the law, the act of the shipper, and the nature of the goods. But delay in itself is not a cause of action: it must be negligent delay. (See *Story on Bailments*, Ninth Edition, Section 545A. *Schouler on Bailments and Carriers*, Third Edition, section 488.) The difference is well stated in *Hutchinson on Carriers*, third edition, section 653, as follows:—

"But the reasons upon which the extraordinary responsibility of the common carrier for the safety of the goods is founded do not require that the same responsibility should be extended to the time occupied in their transportation. The danger of loss by robbery or embezzlement or theft, by collusion and fraud on his part, has no application when the mere time of the carriage is concerned."

And this is the rule in Maryland: *Pennsylvania Railroad Company vs. Clark*, 118 Md. 514 (1912).

Furthermore, where property having moved over the lines of several railroads is delivered at destination damaged, there is a presumption, when it is shown that such property was delivered to the initial carrier in good condition, that the damage occurred on the line of the final carrier. This presumption results from the application of another presumption that a condition found to exist is presumed to continue until the contrary appears. In cases of delay resulting in no physical damage no similar application of the more comprehensive presumption is possible and it is settled in cases of delay that there is no presumption as to the line on which the delay occurred, but that the Plaintiff must localize the delay on the line of the carrier selected by him for suit.

East Tennessee etc. Ry. vs. Johnson, 85 Ga. 497 (1890);

Almand *vs.* Railroad, 95 Ga. 775 (1895);
 Hutchinson on Carriers, 3rd Edition, page 1590;
 6 Cyc., 490, Note 40, page 491;
 Cf. Detroit, etc. Ry. Co. *vs.* McKenzie, 43 Mich. 609
 (1880).

It seems improbable that Congress could have intended to include liability for delay by the use of the words, "loss, damage or injury to the property," which have a meaning that excludes delay.

Moreover, in Adams Express Company *vs.* Croninger, 226 U. S. 491 (1913), this Court apparently recognizes delay as a distinct and separate cause of action from loss, injury or damage to property, since it says, on page 500:

"That the constitutional power of Congress to regulate commerce among the States and with foreign nations comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment by defining the liability of the carrier for loss, *delay*,* injury or damage to such property, needs neither argument nor citation of authority."

(b) But, if it be considered that the words used in the Amendment are not referable to the *cause of action*, but rather to the *elements of damage* resulting therefrom, that is to say, that an initial carrier may be held for the delay of the connecting carrier if such delay causes damage or injury to the property, it would still remain to determine whether the initial carrier could be held where such delay caused no loss, damage or injury to the property, but only loss, damage or injury to the shipper consequent upon conditions having no reference to the actual transportation of the goods. To sustain such liability would involve the carrier in a liability uncertain in extent and speculative in

* Italics ours.

character—a liability which would contravene the public interest.

Thus in the case of *J. C. Shaffer & Co. vs. Chicago, Rock Island & Pacific Railway Company*, 21 I. C. C. 8 (1911), complaint was made to the Interstate Commerce Commission of that provision of the Uniform Bill of Lading which reads as follows:—

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including freight charges, if prepaid) at the place and time of shipment under this bill of lading."

The facts underlying this case were as follows: On December 24th, 1909, the complainant had purchased at Kansas City, Missouri, for immediate shipment 5000 bushels of Durum wheat at the prevailing market price of 99½ cents a bushel delivered in Chicago. The complainant then sold the 5000 bushels of wheat on the floor of the Exchange of the Chicago Board of Trade at 100½ cents a bushel, the market price, with the customary commission of one cent per bushel added. The terms of the contract between the complainant and the purchaser were conditioned upon the early arrival of the consignment. The wheat was delivered to the defendant railroad for transportation and for each car a uniform bill of lading (the form of bill of lading used in the case at bar) was received, with the contract on the back thereof signed by the shipper and the agent of the railroad at Kansas City. The wheat was misdelivered by the carrier to the Quaker Oats Company at Cedar Rapids, Iowa, and was there unloaded by that company in the belief that the car belonged to it. Upon learning of the fact, the complainant bought upon the Exchange at Chicago other wheat of the weight and quality equal to that misdelivered by the carrier and paid therefor the then market price at Chicago of 103½ cents per bushel. It contended in the proceeding before the

Commission that a provision of the bill of lading limiting its recovery as against the carrier to 99½ cents per bushel on account of the failure to make delivery was unreasonable.

The Commission, however, after asserting its jurisdiction to pass on the reasonableness of the regulations and practices in respect to the issuance, form and substance of bills of lading, and to determine and prescribe what regulations and practices are just and reasonable, sustained the provision, holding that it did not *exempt* the carrier from liability, although it was admitted that the contract complained of changed the common law rule as to the measure of damages. The Commission held that the regulation in question rendered "the ascertainment and adjustment of damages comparatively easy," and tended "materially to check litigious prosecution of exaggerated claims of damage."

The significance of this decision is manifest, since the shipper was seeking to recover on account of a change in market prices intervening between the time the car was expected to arrive and the time when the owner thereof, finding it would not arrive, made good the loss by the purchase of other grain. In other words, the case is in all respects similar in principle to that which would have been presented had the car, after being delayed in transit, actually arrived subsequent to the time when the purchaser thereof was compelled to fulfill his contract of sale with his customer in Chicago. In such case, he would have claimed as against the carrier the amount paid by him as a result of the changing market prices. The finding of the Commission is a clear indication that the prosecution of exaggerated claims would be fostered if such elements of damage should be recognized as a proper basis of recovery. In other words, contracts of this character modifying the common law liability in this regard are not unreasonable, but are in accord with public policy.

The form of bill of lading in the Shaffer case is the same as that in this case, although a different provision was in

question, such form having been approved by the Commission as appears on the face of the printed form introduced in evidence in this case (Exhibit, opposite page 22 of the Record). And see *In the Matter of Bills of Lading*, 14 I. C. C. 346 (1908).

Congress advisedly excluded from the Carmack Amendment a liability, which would have made the carrier a partner, as it were, in the speculative ventures of shippers, and a partner, too, who must bear losses, but could not share profits. Discriminations opposed to the purposes of the Act to Regulate Commerce would also have resulted in connection with the settlement of claims.

There are numerous decisions of the State Courts, holding that provisions of bills of lading requiring that notices of claims for loss or damage to shipments shall be filed within a specified time are not sufficient to justify a demand for a similar notice where the shipment has been delayed. "Loss or damage to the property, and injury to the shipper resulting from loss of market, are quite distinct."

Johnson vs. Missouri, Kansas & Texas R. R. Co.,
95 N. Y. Supp. 182 (1905), at page 186.

And see also:

Klass Commission Company vs. Wabash R. R. Co.,
80 Mo. App. 164 (1899);

Leonard vs. Railway Company, 54 Mo. App. 293
(1893);

Frey vs. New York Central Railroad, 100 N. Y.
Supp. 225 (1906);

Kremer & Co. vs. C. M. & St. P. Ry., 101 Iowa
178 (1897).

It is, of course, conceded that the question involved in the cases referred to is not precisely the same as the question involved in the instant case, since it is but natural that the language employed in shipping contracts prepared by carriers should be interpreted with less liberality than the

language employed in an Act of Congress. But when regard is had to the settled difference between the liability for loss, damage or injury to the property and the liability for delay, the decisions referred to are peculiarly helpful as evidencing the clear understanding of the Courts with reference to the meaning of the words here under discussion. And the rules requiring a restrictive interpretation of the provisions of a bill of lading lose much, if not all, of their force when it is remembered that the form under discussion has been recommended by the Interstate Commerce Commission.

The distinction between loss, damage or injury to the property and loss to the shipper resulting from price fluctuations gains special significance when consideration is given to the second paragraph of the Carmack Amendment. This paragraph reads as follows:—

“That the common carrier, railroad, or transportation company issuing such receipt or bill of lading, shall be entitled to recover from the common carrier, railroad, or transportation company *on whose line the loss, damage or injury shall have been sustained*,* the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.”

This second paragraph puts beyond question the proposition that the loss, damage or injury for which the initial carrier is made liable is loss, damage or injury *which is sustained on the line* of one of the carriers participating in the transportation. It is, *therefore, loss, damage or injury which may be localized* and definitely ascertained to have occurred while the property was in the possession of one or other of the carriers. Clearly, physical loss, damage or injury is contemplated, and not a change in value which

* Italics ours.

is sustained not on the line of one of the carriers, but which represents changing conditions off the lines of all of the carriers.

(c) It is appropriate, however, to call to the Court's attention the amendment to the Judicial Code, passed by Congress on January 20th, 1914, which reads as follows:—

"That no suit brought in any State Court of competent jurisdiction against a railroad company, or other corporation, or persons, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under Section 20 of the Act to regulate Commerce, approved February 4th, 1887, as amended June 29th, 1906, April 13th, 1908, February 25th, 1909, and June 18th, 1910, shall be removed to any Court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of \$3000."

That this enactment is not intended to affect the scope of the Carmack Amendment seems clear from the following considerations.

1. *The Act of January 20th, 1914, is not substantive but jurisdictional and cannot enlarge the substantive provisions of the Carmack Amendment.*

The Act of January 20th, 1914, appears as Chapter 11 at page 278 of Statutes at Large, part 1, 1913-14, the title being: "An Act To amend an Act entitled 'An Act to codify, revise and amend the laws relating to the judiciary,' approved March third, nineteen hundred and eleven, being chapter two hundred and thirty-one of Thirty-sixth Statutes at Large."

The Act forbids removal of a suit in a State Court against a railroad company or other common carrier to

recover damages "for delay, loss, or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce" as amended. We have here an Amendment of the judiciary title in regard to jurisdiction of the Federal Courts on removal, and not an amendment of the substantive provisions of the Carmack Amendment. Substantively considered the Carmack Amendment declared (a) that a transportation company receiving property for carriage in interstate commerce should issue a bill of lading; (b) that such transportation company should be liable to the lawful holder of the bill for any loss, damage or injury to such property caused by the carrier; and (c) that such carrier should also be liable for any loss, damage or injury to such property caused by any common carrier to which the property might be delivered in course of further transportation. Such are the substantive provisions of the law known as the Carmack Amendment of Section 20.

A subsequent law forbidding removals in cases brought under the twentieth section is jurisdictional only and cannot enlarge the substantive provisions of the original law so as to include in the initial carrier's liability a decline of market price by delay unaccompanied by any physical injury to property.

2. The phrase "damages for delay" occurring in the Act of 1914 means physical damage to the property and not mere loss of market.

The Carmack Amendment is limited to "any loss, damage or injury to such property" caused by the initial or any connecting carrier. Unless there is a damage to the property the Carmack Amendment does not apply. If the Act of 1914 is to be explanatory of the Carmack Amendment in this regard then the phrase in the Act of 1914, means nothing more than the physical damage to the property which delay may cause. This is necessary because the loss or damage must be to the property and cannot include, by rea-

son of this express limitation in the statute itself, a mere contraction in the market price which may represent a paper loss to the owner.*

2. Was the Plaintiff entitled to recover because its shipment failed to arrive in time for the market of May 28th, when the regulations under which the shipment moved were published in tariffs duly on file with the Interstate Commerce Commission and specifically provided "No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable despatch, unless by specific agreement endorsed hereon."

The cause of action upon which the Plaintiff relies in this case is thus stated in the declaration:—

"The said Defendant * * * did not, with safety and with due diligence, despatch or forward the said strawberries, or transport or deliver the same, with reasonable despatch, and in a safe condition, as they were in duty bound to do, but detained the same, by reason of which detention and delay in transportation and delivery, the said strawberries and peas were damaged and failed to reach their point of destination in the City of New York until too late for the market of the day for which they were shipped and received as aforesaid and for which they would have arrived in due time if the said Defendant and the connecting and terminal lines or railroads, had used due and reasonable diligence in the transportation and in the delivery

* In the following decisions, State Courts have held the Carmack Amendment applicable in cases of delay. *Norfolk Truckers Exchange vs. N. S. Ry. Co.*, 116 Va. 466 (1914); *Fort Smith, etc., R. R. Co. vs. Awbrey*, 39 Okla. 270 (1913); *Southern Pacific Co. vs. Lyon*, 66 So. 209 (Miss., 1914); *M. K. & T. Ry. Co. vs. Carpenter*, 52 Tex. Civ. App. 585 (1908); *Pecos, etc., Ry. Co. vs. Coxe*, 150 S. W. 265 (1912); On the other hand, *In Gulf, etc., vs. Nelson*, 139 S. W. 81 (1911); *Byers vs. Southern Express Co.*, 165 N. C. 542 (1914), the Carmack Amendment was held not to include delay.

thereof * * * and because of the said delay and detention of the said strawberries, they were greatly damaged and a large shrinkage in the value of the said strawberries took place, both because of the deterioration of their condition and because of the decline in the market value or price of the said strawberries, and the Plaintiff was greatly damaged and suffered loss because the said strawberries were not delivered with reasonable despatch by the said common carriers on the day of the market for which they were transported."

The evidence shows that the berries had not suffered any deterioration because of the alleged delay, and the basis on which recovery is sought is the alleged failure to deliver the berries at destination in time for the market for which they were shipped and this alone.

Now the bill of lading or contract of shipment entered into between the Plaintiff in Error and the Defendant in Error specifically provided that:—

"No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon."

The conditions of this bill of lading are printed in full in the record and are the same as the conditions recommended by the Interstate Commerce Commission in its report In the Matter of Bills of Lading, 14 I. C. C. 346 (1908), as will appear by reference thereto. Moreover, the Plaintiff in Error offered to prove that the conditions of the bill of lading were duly published in its tariffs, and were applicable in connection with rates also published in such tariffs; that it held itself out as ready to transport property at the common law liability and published rates for such liability ten per cent. higher than the rates applicable in connection with the liability stipulated and provided for in the bill of lading upon which this shipment moved.

It is manifest, therefore, that *the Peninsula Produce Ex-*

change seeks in this case to recover upon a liability which not only is not offered in the tariffs of the carrier, but is specifically contrary to the contract of transportation into which the carrier through the medium of its tariffs offers to enter. In this connection, the Court's attention is respectfully asked to the case of *Chicago & Alton R. R. vs. Kirby*, 225 U. S. 155 (1912).

In this case, Kirby sought to recover from the railroad on the ground for alleged delay in the transportation of certain horses, relying on the fact that he had endeavored to ship his horses in time for a so-called "Horse special" which was run three times each week from Illinois to New York City, and that the railroad company, knowing his anxiety for quick transportation and that the horses were to enter a horse sale, agreed to carry them so that they would be transported on the so-called "horse special." "The single federal question," the Court said, "rests upon the validity of the contract to so carry these horses as to deliver them at Joliet to be carried through on the 'horse special' leaving Joliet on the 25th of January."

In refusing to allow recovery, the Court said (page 164) :—

"The implied agreement of a common carrier is to carry safely and deliver at destination within a reasonable time. It is otherwise when the action is for a breach of a contract to carry within a particular time, or to make a particular connection, or to carry by a particular train. The railroad company, by its contract, became liable for the consequence of a failure to transport according to its terms. Evidence of diligence would not excuse. If the action had been for the common-law carrier liability, evidence that there had been no unreasonable delay would be an answer. But the company, by entering into an agreement for expediting the shipment, came under a liability different and more burdensome than would exist to a shipper who made no such special contract.

"For such a special service and higher responsi-

bility it might clearly exact a higher rate. But to do so it must make and publish a rate open to all. This was not done.

"The shipper, it is also plain, was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him a particular expedited service, and a remedy for delay not due to negligence.

"An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs, and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advantage in that it is not one open to all others in the same situation."

To the same effect is the case of *A. T. & S. F. Ry. Co. vs. Robinson*, 233 U. S. 173 (1914). In this case, the plaintiff relied on a verbal contract claimed to have been made with the agent of the railroad company for the transportation of horses by a special train known as the "Red Ball." The railroad in defense relied on the fact that the shipper had availed of a reduced rate offered in connection with a special contract for the transportation of live stock. In denying the plaintiff's right of recovery, the Court said (page 180):—

"That the effect of the Carmack Amendment to the Hepburn Act, Section 20, Act of June 29th, 1906, c. 3591, 34 Stat. 584, 593, was to give to the Federal jurisdiction control over interstate commerce and to make supreme the Federal legislation regulating liability for property transported by common carriers in interstate commerce has been so recently and repeatedly decided in this Court as to require now little more than a reference to some of the cases. *Kansas City Southern Ry. Co. vs. Carl*, 227 U. S. 639; *Missouri, Kansas & Texas Ry. Co. vs. Harriman*, 227 U. S. 657;

Chicago, Rock Island & Pacific Ry. Co. *vs.* Cramer, 232 U. S. 490; Great Northern Ry. Co. *vs.* O'Connor, 232 U. S. 508. We regard these cases as settling the proposition that the shipper as well as the carrier is bound to take notice of the filed tariff rates and that so long as they remain operative they are conclusive as to the rights of the parties, in the absence of facts or circumstances showing an attempt at rebating or false billing. Great Northern Ry. Co. *vs.* O'Connor, *supra*. To give to the oral agreement upon which the suit was brought, the prevailing effect allowed in this case by the charge in the trial Court, affirmed by the judgment of the Supreme Court of the State, would be to allow a special contract to have binding force and effect though made in violation of the filed schedules which were to be equally observed by the shipper and carrier. If oral agreements of this character can be sustained then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission. Kansas City Southern Ry Co. *vs.* Carl, *supra*, page 652. To maintain the supremacy of such oral agreements would defeat the primary purpose of the Interstate Commerce Act, so often affirmed in the decisions of this Court, which are to require equal treatment of all shippers and then charging but one rate to all, and that the one filed as required by the Act.

"The Supreme Court of the State in this case affirmed the instructions of the trial Court upon which the case was given to the jury and held that the oral contract was binding unless it was affirmatively shown that the written agreement, based upon the filed schedules, was brought to the knowledge of the shipper and its terms assented to by him. This ruling ignored the terms of shipment set forth in the schedules and permitted recovery upon the contract made in violation thereof in a case where there was no proof that there was an attempt to violate the published rates by a fraudulent agreement showing rebating or false billing of the

property, and no circumstances which would take the case out of the rulings heretofore made by this Court as to the binding effect of such filed schedules and the duty of the shipper to take notice of the terms of such rates and the obligation to be bound thereby in the absence of the exceptional circumstances to which we have referred."

The similarity of the two cases cited to the case at bar is striking. But the instant case is even stronger for the railroad than the decided cases. In the latter, the plaintiff sought to rely on an agreement of the carrier which was at variance with the terms on which, in its tariffs, the carrier professed to transport shipments. In the present case, there was no such verbal agreement and there is no evidence of anything done by the carrier to mislead in any way the intending shipper. Furthermore, in the present case, just as in the Kirby and Robinson cases, the shipper seeks to recover not because his property was in any way damaged by the delay to which it was subjected, but because the failure of the carriers to move it more promptly than was done, caused loss, not to the property, but to the shipper.

It is settled that the regulations contained in the published tariffs of the carriers governing the terms of transportation so far as these regulations are not unlawful.

B. & M. R. R. Co. *vs.* Hooker, 233 U. S. 97 (1914).

This is not an effort on the part of the carriers to exempt themselves from liability in contravention of the provisions of the Carmack Amendment, any more than there was such an effort in the Kirby and Robinson cases. The carrier still accepts liability for negligent delay which results in damage to the property. It merely provides that it does not undertake to become liable for special and peculiar damage to the shipment which may result from delay; or, to put it in another way, it constitutes an agreement to liquidate the damages resulting from delay by reference to the actual physical deterioration of the property.

In this respect, it is similar in principle to the case of

Adams Express Company *vs.* Croninger, 226 U. S. 491 (1913); Kansas City Southern Ry. *vs.* Carl, 227 U. S. 639 (1913); Boston & Maine Railroad *vs.* Hooker, 233 U. S. 97 (1914), and the many cases which, since the Croninger decision, have announced the same principle. It seems unnecessary to elaborate the difference between contracts limiting liability and contracts exempting from liability, but the cases above cited clearly recognize the fundamental difference between the two classes of contracts sustaining the reasonable limitation while condemning the exemption.

Furthermore, the reasonableness of the limitation was not open for discussion in the State Court, since the shipment was an interstate shipment, and no complaint had been made to the Interstate Commerce Commission of the unreasonableness of the regulation in question. If any complaint could justly be lodged against the stipulation, clearly the Interstate Commerce Commission would be the tribunal primarily trusted with the jurisdiction to dispose of the controversy.

Texas & Pacific Ry. Co. *vs.* Abilene Oil Co., 204 U. S. 426 (1907);

B. & O. R. R. Co. *vs.* United States, 215 U. S. 481 (1910);

Robinson *vs.* B. & O. R. R. Co., 222 U. S. 506 (1912);

P. R. R. Co. *vs.* Morrisdale Coal Co., 230 U. S. 304 (1913);

B. & M. R. Co. *vs.* Hooker, 233 U. S. 97 (1914).

HENRY WOLF BIKLÉ,
FREDERIC D. McKENNEY,

For Plaintiff in Error.

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IN THE
Supreme Court of The United States

OCTOBER TERM, 1915

No. 137

NEW YORK, PHILADELPHIA & NORFOLK RAILROAD
COMPANY, PLAINTIFF IN ERROR,

vs.

THE PENINSULA PRODUCE EXCHANGE OF
MARYLAND, DEFENDANT IN ERROR

IN ERROR FROM THE COURT OF APPEALS OF MARYLAND.

BRIEF OF DEFENDANT IN ERROR.

IN THE
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vs.

THE PENINSULA PRODUCE EXCHANGE OF
MARYLAND, DEFENDANT IN ERROR

IN ERROR FROM THE COURT OF APPEALS OF MARYLAND.

BRIEF OF DEFENDANT IN ERROR.

Eugene M. Messick, Printer; Salisbury, Md.

This suit was brought in the Circuit Court of Somerset County, Maryland, against the Plaintiff in Error to recover loss on a car of strawberries due to the negligence of the defendant in Error or some connecting carrier, in the transportation and delivery of the strawberries received by Defendant in Error at its station in Somerset County, Maryland, to be delivered at New York City.

It was brought under what is known as the Carmack Amendment (Hepburn Act, June 29th, 1906) of Sec. 20 of the Interstate Commerce Act of 1887. (Declaration Record pages 1 and 2).

The defendant demurred to the declaration; the demurrer being overruled, the defendant then filed the general issue plea, to which the plaintiff joined issue. The plaintiff below claims to have lost from 2c to 3c per quart because of the fall in the market between the time the berries should have been delivered and the time they were actually delivered. The evidence of the plaintiff below begins on page 4 and concludes with the defendant's 22nd. Bill of Exception, page 19, after which the defendant below offered "pages 1, 20 and 21, Official Classification, No. 35," relating to the Interstate Commerce Commission (Rec. p. 20 to 27). Then follows two prayers on the part of the plaintiff below and 7 on the part of the defendant. Both of the plaintiff's prayers were granted, and all of the defendant's rejected (Record pages 28 to 30).

The verdict and judgment being for the plaintiff, the defendant prayed an appeal to the Court of Appeals of Maryland, which affirmed the judgment. Opinion of the Court of Appeals (Rec. 33 to 40). The defendant then sued out its writ of error to this Court (Record page 40), and made four assignments of error, (Rec. page 42). There are numerous exceptions but the issues of law are embraced in the 4 "assignments of Error," which present

TWO POINTS OF LAW.

While the amount involved is very small, the legal questions are of vast importance to shippers in all parts of the Country, and to none is it of more importance than to the growers and shippers of country produce.

First Question. Does the Carmack Amendment (June 29th, 1906) to the Interstate Commerce Act render a common carrier, being the initial Carrier, liable for loss arising from negligent Delay in the transportation and delivery of produce, and fall in the market value because of this delay.

Second Question. If so, what is the proper measure of damages?

THE FIRST POINT.

This was raised by the demurrer to the declaration and afterward by the 1st, 2nd and 5th prayers of defendant and the Court ruled against the defendant.

The Fifth prayer (page 29) presents the distinct question that "the Carmack Amendment does not impose on the Carrier, receiving a shipment in one State, liability for delay which occurred, not on its line, but on the line of a succeeding carrier into whose possession the goods may be delivered for movement to, or in the direction of its destination." Record page 44.

This prayer is technically bad, because it exonerates the receiving carrier from all liability for damage due to "delay," even if the delay caused a physical damage to the goods. But the defendant explains it by claiming exemption for the first carrier "where such delay does not result in loss, damage or injury to the article shipped." Record p. 44.

We have then the concession of delay somewhere in transit, and we have the uncontradicted proof that the shipper was damaged by a fall in the market value of the berries due to delay. The testimony of Fred T. Adams, Rec. pages 10 to 12, Hezekiah Warne, pages 12 to 15; John B. Wemple, p. 16, Defendant's 14 and 15 Exceptions; Russell Warne, Defendant's 16, 17, 18, 19, 20, 21 and 22 Exceptions, pages 17 to 19.

The Act reads, "the receiving carrier shall be liable to the lawful holder thereof" (the bill of lading) "for any loss, damage or injury to such property, caused by it, or by any common carrier, railroad or Transportation Company to which such property may be delivered."

Is the Statute ambiguous, because of the omission of the word "Delay," or because of the insertion of the words "damage or injury to the property?" Is it the property of the shipper that the statute intends to protect from "any loss, damage or injury?" Cut out the words "damage or injury to such property," and we have the plain unambiguous words, that the Common Carrier receiving property for transportation—shall be liable to the lawful holder of the bill of lading "for any loss caused by it or by any common carrier, etc." Construction can only be resorted to when there is an ambiguity in the law. We submit that the status of the common law of carrier liability, the Act itself, its purpose, scope and remedial provisions must speedily remove any doubt, if

there be any in the language. "These may all be resorted to, to solve, but not to create an ambiguity," said this Court in Hamelton vs. Rathbon, 175 U. S. 410 (44 L. Ed. 222, United States vs. Lexington Mill Co., 232 U. S. 410 (58 L. Ed., 662).

The statute, original and amendments are remedial, and by the universal rule, must receive a liberal construction to effectuate its intent as an **entirety**; but that which is contended for, would defeat its purpose **in part**; that is, as a remedy for relief for "any loss," except for lost or damaged goods. This is not to be tolerated unless the words of the statute compel it. Certain cardinal rules of construction are referred to in Washington Market Co. vs. Hoffman, 101 U. S., 112 (25 Ed. 784-5).

1st. "Significance and effect shall, if possible, be accorded to every word."

2nd. "Every part of a statute must be construed in connection with the whole, so as to make all parts harmonize, if possible, and give meaning to each."

3rd. "To understand the true meaning of the clause, it is necessary to observe what the subject was in regard to which Congress attempted to litigate."

Its operation may be restrained or enlarged beyond the ordinary import of the words when the purpose of the statute and public policy require it. See the able opinion in United States vs. Trans-Missouri Asstn. 166 U. S., 290 (41 L. Ed. 1007) applying the Anti Trust Law to railroads, though not within its terms in words.

The purpose of the original Interstate Commerce Act of 1887, Feb. 4th, was to regulate commerce between the States; and to the extent that it took that control, it was exclusive of the control by the States. There had been a diversity of decisions among the States, as to the liability of the receiving carrier for the through route; some holding to the decision of Muschamp vs. Lancaster, 8 M. and W. 42, and known as the English Rule, while others, among them, Maryland and the United States, holding the American Rule allowing the initial carrier to limit by contract its liability to its own line. The hardship of this rule had been severely criticised, but **authority** had overcome **logic and justice** till Congress assumed **complete control** of the matter by the Carmack Amendment of June 29th, 1906. The purpose of the Original Act is set out Penn. R. R. Co. vs. Hughes, 191 U. S., 488 (48 L. Ed. 272), which was before the Carmack Amendment. The object, says the Court, was "to provide equal facilities for shippers for interchange of traffic, for non-discrimination in freights for con-

tinuous carriage," etc.—concluding as follows: "giving **remedies** for the enforcement of the foregoing provisions, and providing penalties for their violation." Continuous carriage, equal facilities, and uniform rates, were among the principal objects of that statute. But it did not furnish full regulation and adequate uniform remedies in all respects. Pennsylvania had forbidden, by statute the right of a carrier to limit its liability to an agreed valuation, which was upheld by the State Court, and while it was sustained by this Honorable Court, it was said, "It may be assumed that under the broad powers conferred upon Congress over Interstate Commerce, it would be lawful for that body to make provision as to **contracts for interstate carriage**, permitting the carrier to limit its liability to a particular sum, in **consideration of lower freight rates** for transportation." Thus the law stood but "since the decision in the Hughes case *supra*, the Hepburn Act of June 29th, 1906, (34 Stat. at L. 584, Chap. 359, U. S. Comp. Stat. Supp. 1911, P. 1288) has been passed, and this Court has held that by virtue of that Act (particularly Carmack Amendment), the subject of interstate transportation has been regulated by Federal Law to **the exclusion of the power of the States** to control in such respects by their own policy or legislation."

Having taken entire control, it is supposable that Congress meant to compel the receiving carrier to make a contract with the shipper for through transportation, and make it liable **in part**, for neglect of duty or breach of its contract; to make it liable for lost and damaged property, but not for "any loss" arising from negligent transportation or undue delay? Under this construction the shipper would have to seek his remedy for such loss against the carrier guilty of negligence in some State having jurisdiction over the carrier where the delay took place.

This would leave the very hardship and difficulties the statute was intended to cure. The statute was before this Court in *Atl. Coast Line vs. Riverside Mills*, 219 U. S., 200 (55 L. Ed. 180). Mr. Justice Lurton after referring "the the singleness of rate and continuity of carriage," said "there grew up the practice by receiving carriers, of refusing to make specific agreement to transport to points beyond its own line, whereby the connecting carrier, for purpose of carriage, would become the agent of the primary carrier." After reciting the trouble to the shipper of proving his case against the line at fault, he says: "in short as the shipper was not himself in possession of the information as to when and where his property had been lost or damaged, and had no access to the records of the connecting carrier, who, in turn, had participated in some part in the transportation, he was compelled in many instances to make such settlement as should be

proposed. This burdensome situation of the shipping public, in reference to interstate shipments over routes including separate lines of carriers, **was the matter which Congress undertook to regulate**—

At page 203, it is said, "a situation had come about which demanded regulation in the public interest, was the judgment of Congress"—The receiving interstate carriers, "should be required as a condition of continuing in that traffic, to obligate themselves to carry to the point of destination using the lines of connecting carriers, as their own agencies."

"The rule is adopted to secure the rights by securing unity of **transportation with unity of responsibility**. The regulation is one which also facilitates the remedy of one **who sustains a loss by localizing the responsible carrier**." Again at page 205 this Court says, "reduced to the final results the Congress had said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one State, to be transported to a point in another, involving the use of a connecting carrier for some part of the route to have adopted such other carrier as its agent, **and to incur carrier liability throughout the entire route** with the right to reimbursement for a loss not due to his own negligence."

Isn't it too inconsistent for serious argument for the plaintiff in error to contend, that the "unity of transportation with unity of responsibility," means a divided liability; that to "incur a carrier liability for the entire route" means a **divided responsibility** for some part of the losses chargeable to negligence; that Congress meant to facilitate the remedy and to localize the responsible carrier for lost or damaged property, but to leave the remedy at large as to other losses; to relieve "the burdensome situation of the shipping public—which Congress undertook to regulate," and yet to leave a part of the burden unregulated, unprovided for, and the shipping public without a remedy that the Congress intended to facilitate, when it comes to applying it to negligent delay, regardless of how much **loss** has accrued to the shipper, provided there has been no damage to the property. The purpose of the statute is forcibly expressed by the learned Judge of the Court of Appeals of Maryland (Rec. p. 35, 122 Md., 216-224), "it is with the **right of the person sustaining the loss**, and not with any specific cause of injury to the property that the statute is concerned." We beg leave to refer to the opinion of the learned Judge relating to the omission of the word "delay" from the statute (Record, pages 34 to 36, reported in 122 Md., 216). Also to the language of this learned Court in the Harriman case 227 U.

S., 657 (57 L. Ed. 698) where it is said, "the liability imposed by the statute is the liability imposed by the common law."

Adams Exp. Co. vs. Croninger.

226 U. S. 491 (57. L. Ed. 315).

Galveston & Co. vs. Wallace.

223 U. S. 481 (56 L. Ed. 517 and note).

Common law duty required the carrier to transport and deliver within a reasonable time, "and for any failure of this duty within a reasonable time, the carrier is liable for all the consequences of such failure."

B. & O. R. R. Co. vs. Lehman, 56 Md., 233.

"The duty to deliver safely and the duty to deliver in due time are distinct obligations," Lehman case *supra*.

White will case 104 Md., 310.

Diffendal case 109 Md., 509.

Sperber case, 117 Md., 602.

The anomaly of the contention by the plaintiff in error is, that while a common carrier is liable as an insurer, barring a few exceptions; and when not liable as an insurer, it is still liable for "any loss" chargeable to its negligence, or the negligence of a connecting carrier, upon a special contract for through transportation; yet a contract made under the Carmack Amendment for entire transportation, does not impose responsibility and liability for loss upon the primary carrier for negligent transportation and delivery if no damage is done to the property itself, however, much the loss to the shipper "caused by it or a connecting carrier," in the fall of the market value.

This contention, instead of "facilitating the remedy by localizing the responsible carrier" would partially paralyze it.

SECOND POINT.

Assuming the liability of the plaintiff in error, what is the proper measure of damages? The plaintiff in error insists they should have been merely nominal inasmuch as the plaintiff below did not prove the value of the strawberries at the place and time of shipment (3 and 4 prayers, Rec. 45). At the conclusion of the 4th Assignment of Error, page 46, the plaintiff in error says, "all the questions involving the liability of an initial carrier in any interstate shipment, set forth in the foregoing assignment of errors were directly raised by the appellant, the N. Y. P. & N.

R. R. Co., in the Court of Appeals of Maryland, by exceptions to the ruling of the Circuit Court for Somerset County, whose action in granting the plaintiff's 1st prayer, and in rejecting the defendant's said **seven prayers**, and in overruling the demurrer of the defendant to the declaration." In regard to the 7th prayer the opinion of the learned Judge of the Maryland Court of Appeals is a sufficient answer (Record, page 37).

The 6th prayer of the defendant (Record page 45) asks the Court to instruct the jury, "that the tariffs of the defendant duly published and on file with the Interstate Commerce Commission published two rates available in connection with strawberries," and concludes by telling the Jury that it must be guided by the terms and conditions of the bill of lading." It seems to us that the fault of this prayer is glaring. It leaves nothing for the jury to find. It is abstract, and ambiguous except to tell the jury in effect to find for the defendant.

It assumes that all the "conditions" of the bill of lading are applicable and enforceable according to their terms without any aid from the Court. It assumes that there is some sort of liability other than a common law liability, and that the latter is not the liability in this case because of two different rates available for strawberries. In passing we refer to the fact that there is **no proof of any rates available for strawberries**; the bill of lading does refer to a "lower value."—to be determined by the classification or tariffs upon which the rate is based."

All this is without explanation to the jury and without pointing the mind of the jury to any evidence of classification or tariffs or rates.

Now the defendant below did offer in evidence "page 1, 20 and 21, official classification No. 35, etc." Record pages 20 to 27.

But an examination will show excerpts that will require a railroad expert to interpret. It seems that there are several forms or kinds of bills of lading. There is a sample form at page 22 of the Record, but "does not seem to be quite uniform with that issued to the plaintiff on Record p. 6.

There is a Heading called "official classification No. 35," page 20 and "Rules and Special Instructions" page 21, (presumably for railroad employees) in which we find reference to "limited liability" and "conditions," and declaring certain results, if the shipper does or does not elect "to accept all the terms and conditions of the Uniform Bill of Lading," with ten per cent. to be added in certain contingencies, all of which is manifestly intended to hedge about the liability of the carrier and irrelevant in this case.

We do not see that all this enlightens the jury as to how much the plaintiff is damaged; nor do we comprehend how much or to what extent, it limits the liability or lessens the responsibility of the carrier in this case.

The real question hangs upon the defendant's 3rd and 4th prayers in its 3rd Assignment (page 45) and upon the plaintiff's 1st prayer, Rec. p. 28. Is it the **market value** at the time and place of shipment, or is it **the fall in market value** at the place of destination? As to the latter the plaintiff in error contends that as no "evidence was produced to show the value of the article shipped, at the place and time of shipment and no evidence of damage to the plaintiff except the alleged damage due to the failure of the defendant and its connection to deliver the shipment in time for the market for which the plaintiff claimed it was intended, and under the above provisions of the bill of lading, such damage is not recoverable" (3rd Assignment, Rec. p. 46). This is a reliance upon the provision in the bill of lading quoted on page 46: "No carrier is bound "to transport said property—"in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement herein."—"The amount of any loss or damage for which any carrier is liable, shall be computed on the basis of the value of the property (being the **bona fide invoice price, if any, to the consignee**, including the freight charges, if prepaid) at the time and place of shipment, under the bill of lading, unless a lower value has been represented in writing," etc.

The plaintiff in error seems to abandon the other alternative clauses, "or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such **lower value** shall be the maximum amount to govern such compensation whether or not such loss or damage occurs from negligence."

The learned Judge of the Court of Appeals ruled that the plaintiff's 1st prayer was wrong, but affirmed the judgment because "it is reasonably certain in view of the jury's award that there was no practical injury to the defendant from these rulings;" the Court therefore "judicially assumed their value at the time and place was at least two cents per quart which the jury allowed as damages." The defendant in error was not injured by the decision of the Court of Appeals, but the defendant in error does apprehend great uncertainty and injury, if the rule for measuring damages should be established by this Hon. Court, as contended for by the plaintiff in error. With high esteem for the opinion of the learned Court of Appeals of Maryland, we beg leave to present our views on the correctness of the prayers of

the plaintiff in error, and of the 1st prayer of the defendant in error, as well as of the Court's opinion relating thereto.

The Court on page 39 of the record 122 Md. Rep. page seems to draw an analogy between the case now at issue and a "lower rate in consideration of his agreement that his (the plaintiff's) loss should be computed on the basis of the actual value of the commodity delivered to the carrier."

It is a fundamental principle that a party injured shall receive adequate compensation for the value of his property and remuneration for loss of profits, when proved with a reasonable degree of certainty. Notwithstanding conflicting decisions, this rule is well established from the time of *Hadly vs. Baxendale*, if the proof does not show the profits to be too speculative and uncertain. It is also clearly established that a declared value or an agreed value **regardless of "actual value" in consideration** of paying a lower freight rate estops the shipper from recovering more than the "agreed value;" That is where the party injured has furnished the best proof of the value or damage for a consideration which operates as an equitable estoppel founded in fair dealing and public policy, which may be said to offset in some degree another doctrine of public policy, which forbids a common carrier to exempt itself from liability by contract. Beginning with the leading case of *Hart vs. Pa. R. R. Co.*, 112 U. S., 331 (28 L. Ed. 719) we find there an express contract in the bill of lading stipulating to carry for 94c per 100 lbs. the animals "on the condition that the carrier assumes a liability to the extent of the following agreed valuation;" then follows the agreed valuation. The learned Judge said "there is no justice in allowing the shipper to be paid a larger value for an article which he has induced the carrier to take at a low rate of freight, on the assertion and agreement that its value is a less sum than that claimed after a loss." "The shipper is estopped from saying the value is greater." "It is repugnant to the soundest principles of fair dealing, and the freedom of contracting, and this in conflict with public policy, if a shipper should be allowed to risk the benefit of a contract if there is not a loss, and repudiate it in case of loss." **Public policy forbids the carrier to contract for immunity, and on the other hand public policy and fair dealing will not allow a shipper to take a fraudulent advantage of this disability on the part of the carrier.** The **Hart case supra** required no proof of value dehors the contract of shipment. But that is not this case. This Honorable Court following the lead of the Hart case, places its decisions upon the same ground of estoppel. The carrier may by contract "protect itself against extravagant or fanciful valuation" said the Court in *Chicago R. R. vs. Solons*, 169 U. S., 136

(42 L. Ed. 691.) N. Y. L. E. and W. R. Co. vs. Estill, 147 U. S. 617, (37 L. Ed. 305).

While there are decisions which do not agree with the above doctrine, they are quite uniform that all the presumptions are against the carrier's immunity or exemption; and that to limit the liability for the **amount** of damage resulting from negligence, it must be established by express contract, and then it is permitted only because good faith and fair dealing demand it. It is not allowed as a favor or as an immunity to the carrier or as lessening its common law responsibility for negligence. Parker vs. Preston, 198 N. Y., 4434 (15 N. E., 705), Kenny vs. N. Y. Cent. R. R., 125 N. Y. (26 N. E., 626), Jennings vs. Grand Trunk, 127 N. Y. (28 N. E., 397).

But to make an estoppel there must be a "declared valuation" or an "agreed valuation" between the shipper and carrier for the purpose of getting the lower of two freight rates, or for the purpose of determining which of two alternative rates is to be paid by the shipper for a **particular shipment**. It is not a general rule made by the carrier for **general shipments** to be used for its advantage or immunity. Croninger case, 226 U. S. 509 (57 L. Ed., 321) holding that it is "by a fair, just open and reasonable agreement," "that the carrier" may limit the amount recoverable by a shipper in case of loss or damage, to an agreed value for the purpose of obtaining the lower of two or more rates of charges to the amount of risk." To the same effect is the Harriman case, 227 U. S., 671 (57 L. Ed. 697). Carl case 227 U. S., 649 (57 L. Ed. 687), Pearsoll vs. W. U. Tel. Co., 124 N. Y., 256 (26 N. E., 536); N. Y. Cent. R. vs. Estill, 147 U. S., 617 (37 L. Ed. 305). In the Harriman case at page 672 of 227 U. S., it is said "the liability imposed by the statute is the liability imposed by the common law upon a common carrier and may be limited or qualified by **special contract with the shipper**, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence," and cites a number of cases.

We do not understand that the case of Boston and M. R. vs. Hooker, 233 U. S., 97 (58 L. Ed. 869) meant to change or vary this doctrine. In that case, as we apprehend it, the point is, whether the passenger was bound by the fixed valuation of \$100.00 for lost baggage unless the passenger declared a greater value, and paid the excess charges for the same.

After referring to the Interstate Commerce Regulation relating to baggage, which reads "baggage liability is limited to **personal baggage** not to exceed \$100.00 in value, unless a greater value is declared," etc.—The effect of the filing gives the regula-

tion as to baggage the force of a contract determining Baggage Liability.

We have, therefore, a contract for a liability of the fixed value of \$100.00 for baggage liability unless the parties agree to a higher value in consideration of excess charge for the greater risk. That is to say, the passenger got what she paid for, to wit, passage for herself and carriage for her trunk at a contract valuation of \$100.00.

If we may be permitted to summarize the law as we gather it from the authorities, it is as follows:

1. The liability of a common carrier is the common law liability, which makes the carrier an insurer, subject to a few exceptions, and among these exceptions is property having inherent defects, or perishable property.

2. That under the Interstate Commerce Act, this liability remains as at common law, regulated, but not abridged, and, therefore,

3. Liable (if not as insurer) for "any loss" resulting from its negligence in spite of a contract for its exemption in whole or in part.

4. That the **legal remedy** of the shipper to recover for "any loss" remains intact by the statute, in its essence, but is given more efficacy by the Carmack Amendment.

5. That the **legal liability** of the receiving carrier is for "any loss" to the shipper, either as an insurer or for negligence, as the case may be; and that a contract for specific value based on a rate makes no change in the character of the liability but covers "any loss" because of the contract valuation operating as an estoppel.

6. The corollary of this is, we submit that if the carrier tries to limit the value or loss below the actual value or loss, proved by the usual rules of evidence, by a contract which takes the loss out of these usual rules and makes an exception thereto, then the burden is on the carrier (A) to plead it, and (B) if not, its duty to plead it specially, then it should prove it under the general issue.

This is the rule stated in 6 cyc., 514; "the better rule is that the special contract containing conditions in favor of the carrier is properly a defensive weapon, to be used by the carrier when sued; and that the shipper may disregard it and sue for breach of common law duty." This is quoted with approval in McGrath vs. Northern Pacific R. R., 121 Minn., 258, L. R. A., N. S., 1915, D.

and note. 17 Wall. 357, (21 L. Ed., 627, Northern Centr. vs. Lockwood.)

By the "conditions" of the bill of lading, Sec. 1, Rec. p. 7, the defendant below accepts the burden of proving freedom from negligence. Now as the negligent delay was proved, is not the carrier liable for all the legitimate loss, unless it brings itself within the contractual limitation.

Now we come back to the contention of the plaintiff in error, that the loss should have been by proof of the "value" at the point of shipment, which by its contention must be either the market value or the price fixed by the invoice. The bill of lading undertakes to measure the value at the point of shipment by "the bona fide invoice price to the consignee." As there is no declared or agreed value, nor **invoice price**, by which to measure the damage or value, therefore a resort to the market value means a resort to evidence outside of the bill of lading or receipt, and to testimony of witnesses familiar with the market price or value. We do not understand that the decisions this Court intend to cast any such burden on the "shipping public;" nor do we understand that the carrier would be allowed to prove the value by such testimony for the purpose of reducing its liability for loss to a shipper. The "invoice price" is not **per se** the market value. It is the price named or agreed upon between the consignor and consignee, vendor and vendee, and the carrier is not a party to it and presumably has no knowledge of it; and by its very terms, to bind the carrier as a measure of loss, it must be bona fide, not inflated or fictitious. What is an "invoice price?" It is a detailed statement of the nature, quantity, cost or price of the things invoiced. 17 A. & E. Ency. Law 2 Ed., 478, Dowes vs. Bank, 91 U. S., 630, (23 L. Ed. 218).

Sturn vs. Baker, 150 U. S., 325 (37 L. Ed. 1100) where the invoice was referred to as evidence of a sale. Arthur vs. Stoddard, 96 E. S., 146 (24 L. Ed., 814), was the use of the invoice price as the value of goods to be appraised for levying a duty.

As there is no proof of an agreed value, nor of an invoice price, what are the words "lower value" in the bill of lading related to or compared with. The bill of lading seems to contemplate three ways of arriving at a value. 1. The "bona fide invoice price." 2. The "lower value represented in writing by the shipper, or agreed upon," or 3. "Determined by the classification or tariffs." Now how can the "lower value" be compared with something unknown to the Court or Jury and without proof of different rates, available for strawberries, or of the freight paid, there is nothing in that aspect for the jury to pass upon as to a lower or higher

value. Neither is it the freight rate which determines the value but the value determines rate, was held in the Harriman case, 227 U. S., 671 (57 L. Ed. 697) the Carl case 227, page 650.

If we leave the rule for the measure of damages laid down in plaintiff's 1st prayer and resort to the language of the bill of lading, the rule is in a chaotic and uncertain condition. If the bill of lading amounted to a contract to release the carrier for a part of the loss whether with or without consideration "it is no more valid than one where there is a complete exception," said this Court in the Carl case, 227 U. S. 650 (57 L. Ed. 687). We submit, therefore, that the bill of lading is not enforceable as a measure of damages, under the decision of this Court. What are some of the probable results of the uncertain rule contended for by the plaintiff in error when applied to country produce such as strawberries shipped in large quantities for sale elsewhere?

There has within the last few years grown to be a quasi market at some of the many railroad stations from Cape Charles up the peninsula composed of Virginia, Maryland and Delaware, because of buyers from the cities coming to buy car load lots for their respective commission houses; and some persons buy with a view to shipment for profit. But that market is entirely controlled by the market in the cities to which they are to be consigned, of which the buyers are advised daily by wire, consequently that market is irregular, varying from day to day. Again many growers who bring their produce to these **large country shipping points** (often small villages) consign their own produce.

All of this shows the practical impossibility for the shipper and carrier to agree daily on a valuation for determining the rate of freight.

Again there are many small stations where no buyers come; at which points there is not even a relative market value, from which stations the growers are compelled to take the risk of shipment. Would it be at all practicable for the shipper and carrier to attempt to agree on a valuation for each day, each car load, with reference to rates?

In referring to the "computation" in the case, the learned Judge of the Court of Appeals says, "it would be to restrict the recoverable loss of market value within the shipping value with respect to which the carrier assumed responsibility." In view of this, let us suppose the "shipping value" were less than "the loss of market value," what is to hinder the carrier from destroying them, or from selling them on its own account and settling for them at "shipping value," that is, at the point of shipment?

Yet if the "shipping value" is greater, the carrier and not the shipper gets it. Of course, the shipper should not be permitted to get both the actual value, plus the market (shipping) value if the two should be more than his actual loss; but neither should the carrier be permitted to take a position that could be used to its advantage. To illustrate further the uncertain results, suppose the market should advance instead of falling, would the shipper be entitled to recover the value at the point of shipment, regardless of the fact that he has suffered technically only nominal damages for breach of contract. If the shipper can not recover for the full shipping value, would it be incumbent on the carrier to prove that the shipper had not been actually damaged but benefitted by the delay, because of the rise in the market?

Would not this rule be a very uncertain regulation of Interstate Commerce in its effect on the measurement of damages arising from negligence, in the absence of a stipulated or "agreed valuation?"

As contended for, does it not relieve the wrong doer of proving even a mitigation for the loss caused by it, and place upon the "shipping public" the double burden of proving the values at both ends.

In conclusion we submit that the carrier is liable for "any loss," provable by the usual rules of evidence, unless the shipper and carrier have agreed upon fixed, liquidated damages in advance of shipment.

Respectfully submitted,

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